PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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No. 09-128

IN THE

Supreme Court of the United States

WILLIAM COVALT, INDIVIDUALLY, LOREN MORGAN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LINDA COVALT, DECEASED, PETITIONERS

v.

ALLSTATE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether it is proper to exercise jurisdiction under the Federal Declaratory Judgment Act when: A) There is a pending action filed in a state court by the declaratory defendant; B) Only state law issues are involved; and C) Exercising jurisdiction will result in applying a different state's law to the defendant's state court action.

II. Do *Erie* principles prevent using the Federal Declaratory Judgment Act when it changes the law to be applied to the "true" plaintiff's concurrent state lawsuit?

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The Order and Judgment of the United States Court of Appeals for the Tenth Circuit is not selected for publication but is available at 2009 WL 693347 (10th Cir. March 18, 2009) and is reprinted in the Appendix at 1a. The Judgment of the United States District Court for the Western District of Oklahoma is not reported but is filed as No. 5:07-cv-01275-HE (W.D. Okla. July 8, 2008) and is reprinted in the App. at 9a. The Order granting summary judgment issued by the District Court, and referenced in its Judgment, is filed as No. 5:07-cv-01275-HE (W.D. Okla. June 20, 2008) and reprinted in the App. at 11a. The Order of the District Court retaining declaratory jurisdiction is referenced by the Tenth Circuit opinion and filed as No. 5:07-cv-01275-HE (W.D. Okla. April 15, 2008); it is also reprinted in the App. at 29a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 2009. App. at 1a. A timely petition for rehearing was denied on April 27, 2009. *Id.* at 37a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

28 U.S.C. § 2201(a)

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section

7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT

Linda Covalt died in an automobile accident in New Mexico. She was a passenger in a vehicle driven by her husband, William Covalt; the Covalt's were Oklahoma residents. The vehicle was insured by Allstate Insurance Company under two policies having liability limits of $2,250,000. However, Oklahoma and New Mexico laws differ on how much of this limit is recoverable.

The conflict centers upon a policy provision that reduces the coverage to Oklahoma's financial responsibility minimum of $25,000 if the tortfeasor and victim are resident relatives. New Mexico refuses to enforce these provisions, considering them to violate its public policy, even if the insurance policy is made in another state. *State Farm Mut. Auto. Ins. Co. v.*

Ballard, 54 P.3d 537, 538-39 (N.M. 2002).[1] On the other hand, current Oklahoma law recognizes the clauses. *See Hartline v. Hartline*, 39 P.3d 765, 773 (Okla. 2001).

Mrs. Covalt's beneficiaries made a claim against Allstate. The negotiations came to an impasse when Allstate insisted Oklahoma, not New Mexico law, applied. When Petitioners disagreed, Allstate, within a week of advising its position, filed a declaratory judgment action in the United States District Court for the Western District of Oklahoma. It sought a declaration that Oklahoma law controlled and its total exposure was limited to $25,000. Jurisdiction was based upon diversity of citizenship.

Mrs. Covalt's estate then filed a wrongful death case in New Mexico. The suit also sought a declaration that the entire policy limits were available to satisfy any damages awarded. App. at 38a.

Petitioners' requested the federal court to Dismiss or Stay its proceedings in deference to the New Mexico state court action. Those motions were denied and the Oklahoma federal court then granted Summary Judgment to Allstate, concluding Oklahoma law applied and the drop down provision was therefore enforceable. *See generally id.* at 11a-36a.

The Tenth Circuit sustained the trial court's rulings, *id.* at 8a, and denied Petitioners' Request for

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[1]In *Ballard*, a case regarding a single-car automobile accident that occurred in New Mexico and involved no New Mexico residents, the New Mexico Supreme Court refused to enforce a drop-down provision of an insurance contract which was executed in Georgia.

En Banc Appeal. *Id.* at 37a.

Allstate requested the New Mexico state trial court to grant full faith and credit to the Oklahoma federal court judgment, *id.* at 41a; the motion was denied. *Id.* at 52a. The question was presented to the New Mexico Supreme Court upon a Writ for Extraordinary Relief, and the New Mexico Supreme Court entered an Order compelling the trial court to give full faith and credit to the federal court's declaratory judgment. *Id.* at 75a-76a.

Petitioners now respectfully seek this Court's review of the propriety of the district court's decision to retain jurisdiction where a declaratory judgment plaintiff is using the Act to change the law that applies in a pending state court action involving the same parties and subject matter.

REASONS FOR GRANTING THE PETITION

The interrelationship between state and federal courts regarding the exercise of the federal Declaratory Judgment Act (or "the Act") is an important issue that has required this Court's attention on several occasions. *See e.g. Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995); *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942). The Court should grant Certiorari here to examine the propriety of exercising the Act when doing so alters the law applied in the concurrent state suit.

By exercising its discretionary jurisdiction the Federal Court interfered with New Mexico's right to apply its law in the case filed there. It has forced the New Mexico court to limit Petitioner's relief in a

manner with violates that state's public policy. Such an outcome violates *Erie* policy and ignores this Court's admonishments in *Brillhart* regarding "gratuitous interference" with the disposition of state-law issues. *See id.* at 495 (reaffirmed by *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995)). In *Brillhart*, the Court held that retaining federal declaratory jurisdiction when a concurrent state court suit can fully adjudicate the matter is vexatious and uneconomical and a practice that should be avoided. *Id.*

The Judgment of Tenth Circuit endorses application of the Act in situations where doing so changes the law from that selected by the "real" plaintiff in the concurrent state court action. Whether or not this is an appropriate use of the Act has never been addressed by this Court. However, the Supreme Court has found in another context that federal procedural statutes should not be used as a means of subverting a tort victim's choice of favorable law.[2]

Finally, the ruling below conflicts with the finding of the Fifth Circuit that choosing a forum for the purpose of changing the law applied to a lawsuit filed in another state is an inappropriate use of the Declaratory Judgment Act. *See Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 602 n.3 (5th Cir. 1983).

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[2] In *Van Dusen v. Barrack*, the Supreme Court held *Erie* policy mandated that a change of venue should not result in the subversion of a tort victim's right to choose an appropriate forum with favorable law. 376 U.S. 612, 633-34 (1964).

I. ERIE POLICY IS VIOLATED BY FEDERAL COURTS ALLOWING PROCEDURAL STATUTES TO CHANGE WHICH STATE LAW APPLIES

Erie policy mandates the "accident" of diversity not result in a substantially different outcome in federal court than would be achieved if the action were filed in state court. *See Hanna v. Plumer*, 380 U.S. 460, 467 (1965). In *Van Dusen v. Barrack*, the Court held that *Erie* principles dictate that the plaintiff's choice of favorable law could not be subverted by a transfer of venue. 376 U.S. 612, 633-34 (1964).[3] Furthermore, when extending this holding in *Ferens v. Johne Deere Co.*, the Court noted that plaintiffs have a right to select a forum with advantageous law. *See* 494 U.S. 516, 524 (1990) ("[T]he plaintiff's venue privilege and resulting state-law advantages...").

The Declaratory Judgment Act, like the Change of Venue Statute, is both procedural and discretionary.[4]

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[3]In *Van Dusen*, the plaintiffs filed suit in the Eastern District of Pennsylvania. 376 U.S. at 614. The *defendants* sought transfer of the case to the District of Massachusetts because there were related suits filed in that court. *Id.* This Court held that a transfer of venue should not change the law applied in diversity cases. *Id.* at 639. Twenty-six years later, the Supreme Court reaffirmed its commitment to this principle and extended the holding from *Van Dusen* to apply even when the *plaintiff* is the party seeking transfer. *See Ferens v. John Deere Co.*, 494 U.S. 516, 524-27 (1990).

[4]The transfer of venue statute is procedural, *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988); and, the plain language of the statute bestows discretion. *See* 28 U.S.C.A. 1404(a) ("district court *may* transfer" emphasis added). The Declaratory Judgment Act is also "procedural only," *Vaden v. Discover Bank*, 129 S.Ct 1262, 1278 n. 19 (March 9, 2009) (citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)); and whether to grant relief is

Therefore, it stands to reason that a tort victim's right to choose an appropriate forum with favorable law deserves the same protection in declaratory action suits as it does in the transfer of venue context.

In the present case, both the "accident" of federal diversity jurisdiction and the subversion of the plaintiff's choice of favorable law concerns are present. Allstate would not have had the privilege of filing a federal declaratory action if not for the "accident" of diversity because it has neither its principle place of business nor state of incorporation in Oklahoma. If either were present, the federal court house doors would not be open to it.

Furthermore, Loren Morgan, as Personal Representative of Mrs. Covalt's estate, is the "true" or "real" plaintiff because the position of the parties is reversed in declaratory action suits. *Stuart Weitzman, LLC v. Microcomputer Resources, Inc.*, 542 F.3d 859, 862 (11th Cir. 2008); *see also Traveler's Ins. Co. v. Louisiana Farm Bureau Federation, Inc.*, 996 F.2d 774, 777 (5th Cir. 1993). He is the plaintiff in the New Mexico wrongful death suit. As such, Morgan has a right to choose a forum with favorable law; however, in the present case that right has been subverted by Allstate's employment of the Federal Declaratory Judgment Act.

This court should grant Certiorari to address to what extent *Erie* concerns exist in declaratory judgment actions where granting relief permits a

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likewise discretionary. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289 (1995).

federal court changing the state law applied. This is particularly so when one considers this Court's admonition against using the act in such a manner, discussed in Proposition II.

II. EXERCISING DECLARATORY JURISDICTION WHEN IT CHANGES THE APPLICABLE STATE LAW UNDERMINES *BRILLHART* AND *SEVEN FALLS*

It is vexatious and uneconomical for a federal court to proceed in a declaratory judgment action when there is a concurrent state law suit that will fully adjudicate all the issues; such "gratuitous interference" with state court proceedings *should be avoided. Brillhart*, 316 U.S. at 495 (emphasis added). This holding was revisited and reaffirmed by the Court fourteen years ago in *Wilton v. Seven Falls*. 515 U.S. at 283.

In *Brillhart*, the action was remanded to the United States District Court for the District of Kansas in order for that court to determine whether the pending garnishment proceeding in a Missouri state court, applying Missouri law, would fully resolve the controversy. 316 U.S. at 498. The crux of the Court's opinion was that the federal district court in Kansas should give deference to the Missouri state court if the pending state court action could settle the whole dispute. *See id.* at 494-97.

This Court granted Certiorari in *Brillhart* because of the importance of the Declaratory Judgment Act and its interrelationship between state and federal courts. *Id.* at 494. This case places that

interrelationship front and center.

The declaratory judgment Order has forced New Mexico to apply Oklahoma's law and public policy, rather than its own, in the New Mexico wrongful death claim; a claim over which the Oklahoma federal court did not have jurisdiction.

If intervening with federal declaratory jurisdiction when a concurrent state action can fully resolve a matter is vexatious, then doing so to impose one state's public policy onto another regarding an action the former does not have jurisdiction to hear is even more impudent.

Furthermore, the concern for judicial economy expressed by the Court in *Brillhart* was not served by the district court's intervention. As previously stated, the district court could not fully adjudicate the entire controversy because it did not have jurisdiction over the related wrongful death claim. From the outset, any proceedings by the federal district court were necessarily in addition to those taking place in New Mexico state court. However, the New Mexico suit could resolve all issues in controversy. The resulting conflict and turmoil between the two courts regarding which state law applies and whether full faith and credit should be given the district court's judgment is evidence of the inefficiency this Court sought to avoid when articulating its holding in *Brillhart*.

III. THE ORDER AND JUDGMENT OF THE TENTH CIRCUIT IS INCONSISTENT WITH THE FIFTH CIRCUIT'S FINDING IN *MISSION*

The court below established a rule that is in direct conflict with another circuit and the ambivalence should be resolved. The Court of Appeals for the Fifth Circuit has found that using a declaratory judgment action to choose the forum where a case will be decided, and thereby change the law to be applied to the declaratory judgment defendant's state court action, is not a proper use of the Declaratory Judgment Act. *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 602 n.3 (5th Cir. 1983).[5]

In *Mission*, the Fifth Circuit upheld the district court's refusal to exercise declaratory jurisdiction in part because there was evidence Mission filed its declaratory judgment action in Texas in order to prevent Puritan from filing an action involving the same issues in California state court, where different choice-of-law and burden-of-proof provisions might have applied. 706 F.2d at 602 n. 3.

Here, the lower courts never considered the effect exercising declaratory jurisdiction would have on the pending New Mexico state court suit. Nor did they address the propriety of using the Declaratory Judgment Act to force New Mexico to apply Oklahoma law instead of its own. *See generally* App. at 6a, 31a-35a. They did acknowledge procedural fencing as a

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[5] *see also American Auto. Ins. Co. v. Freundt*, 103 F.2d 613, 617 (7th Cir. 1939) (stating in dicta that "[t]he wholesome purpose of declaratory acts would be aborted by its use as an instrument of procedural fencing ... to choose a forum.").

consideration, *id.* at 32a, but summarily concluded exercising jurisdiction was justified because Petitioners (the "true" plaintiffs) engaged in "as much" forum shopping as Allstate by picking a forum with favorable law for their wrongful death suit. *Id.* at 35a.

Such reasoning ignores the fact that the Supreme Court has used *Erie* principles as a protection to tort victims' right to choose a state forum with favorable law. *Van Dusen, supra.* It likewise gives undo credence to which lawsuit was filed first. In *Seven Falls,* the fact that the declaratory judgment action was filed before the state court action was never considered, implying that whether the state action was filed before or after the federal declaratory action is of little consequence.

The lower courts' ruling here is contrary to the Fifth circuit opinion in *Mission.* Although unreported, it will encourage potential defendants to use the Act as an offensive weapon to select a forum that changes the law to be applied in concurrent state court proceedings. If the issue is not resolved the circuit courts will be forced to adjudicate the issue repeatedly, with conflicting results. A definitive decision from this Court will prevent such unnecessary litigation.

CONCLUSION

For the foregoing reasons, Petitioners respectfully ask the Supreme Court of the United States to grant their Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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(any footnotes trail end of each document)
Nos. 08-6169 & 08-6170
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ALLSTATE INSURANCE COMPANY,
Plaintiff-Appellee,

v.

WILLIAM COVALT, individually, LOREN MORGAN, as personal representative of the estate of Linda Covalt, deceased,
Defendants-Appellants.

March 18, 2009, Filed

(D.C. No. 5:07-CV-01275-HE). (W.D. Okla.).

Before McCONNELL, McKAY, and GORSUCH, Circuit Judges.

ORDER AND JUDGMENT *

Plaintiff Allstate Insurance Company filed this declaratory judgment action seeking a determination of the amount it was required to pay under an automobile liability policy and an umbrella policy, with limits of $ 250,000 and $ 2,000,000, respectively, to defendants William Covalt and Loren Morgan, as personal representative of the estate of Mr. Covalt's late wife, Linda. The district court took jurisdiction to determine the rights of the parties, decided that Oklahoma law applies to this diversity case, and granted summary judgment to Allstate, holding (in relation to the issues

in this suit) that Allstate owed defendants no more than $ 25,000 in liability coverage. Defendants' subsequent appeals were consolidated. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I. Facts and Procedural History

Mr. Covalt is a citizen of Oklahoma and his late wife, Linda, was also a citizen of Oklahoma. In August 2007, Mr. Covalt lost control of his automobile while they were driving through New Mexico, and his wife died from injuries sustained in this single-vehicle accident.

The Covalts had two policies with Allstate--an automobile liability policy and a personal umbrella policy issued to their daughter, LaDon, also a citizen of Oklahoma. Allstate pointed out to Mr. Covalt that the automobile policy contained a "step-down" provision that reduced its liability coverage from $ 250,000 to Oklahoma's minimum required coverage of $ 25,000 because the injured person, Mrs. Covalt, was a resident relative of the insured, Mr. Covalt. Allstate further contended to Mr. Covalt that the umbrella policy excluded coverage for personal injury to an insured and, therefore, provided no coverage for Mrs. Covalt's death. Mr. Covalt contended that New Mexico law applied to his claims, and that New Mexico would not enforce the step-down provision reducing the policy limits of the auto policy. He refused to accept the amount Allstate offered him.

Because the parties were unable to agree on coverage, Allstate filed this declaratory judgment action on November 13, 2007, naming Mr. Covalt as the

defendant both individually and as the surviving spouse of Linda Covalt.

Defendant Loren Morgan was subsequently named the personal representative of Mrs. Covalt's estate, and he filed a wrongful death action against Mr. Covalt on behalf of her estate in New Mexico state court on December 6, 2007. Mr. Morgan filed two amended complaints in that case, "adding Allstate as a defendant and adding a claim for a declaratory judgment that the 'step-down' provision in the insurance policy cannot be enforced because it violates New Mexico public policy." Aplt. App., Vol. II, Tab 10, at 2-3.

Allstate then moved in this action to substitute Mr. Morgan for Mr. Covalt in his capacity as the surviving spouse of Linda Covalt and to amend its complaint to add a claim for a declaratory judgment that there was no coverage under the personal umbrella policy issued to LaDon Covalt. Mr. Covalt moved to dismiss or stay this declaratory judgment action because of the pending state court suit. In an order filed on April 15, 2008, the district court granted Allstate's motion to substitute Mr. Morgan as a defendant and to amend its complaint, and denied Mr. Covalt's motion to dismiss or stay this suit. *See generally id.*

Allstate then moved for summary judgment in this suit, and Mr. Morgan moved to dismiss or stay this suit. In an order filed on May 13, 2008, the district court denied Mr. Morgan's motion, concluding that it amounted to "a request for reconsideration of the court's earlier decision [that] presents nothing that alters this court's previous analysis and determination of the question." *Id.*, Tab 15, at 1. Mr. Covalt and Mr. Morgan then

moved for a continuance under Fed. R. Civ. P. 56(f) in order to conduct limited discovery on an asserted inconsistent position taken by Allstate in a New Jersey case on the choice of law issue. *Id.*, Tab 16.

In an order filed on June 20, 2008, the district court denied defendants' motion for a continuance and granted Allstate's motion for summary judgment. *Id.*, Tab 24. The court noted that defendants sought the sealed portions of Allstate's briefing in the New Jersey case, but such extrinsic evidence would be improper to prove the existence of an ambiguity in the contract language, and "the [unsealed] portions of the Allstate brief already available to defendants enable them to frame whatever argument they think is applicable in construing the contract language." *Id.* at 5 n.2. The court also decided that Oklahoma law, not New Mexico law, applies to this dispute. *Id.* at 3-9. The court noted that "[n]o party has pointed to any alleged ambiguity [in the policy language] and the court determines that the relevant language in both the automobile policy and the personal umbrella policy is unambiguous so the court will apply the plain meaning of the policy provisions." *Id.* at 9. The court concluded that Allstate was obligated under the automobile policy for only $ 25,000 in liability coverage because the step-down provision was enforceable. *Id.* at 10-11. The court further determined that an enforceable exclusion in the umbrella policy precluded coverage in this case. *Id.* at 11. The district court entered judgment in Allstate's favor on July 8, 2008.

II. Issues and Legal Analysis

Defendants raise five issues on appeal: (1) the district court abused its discretion by not dismissing or staying this declaratory judgment action when there was a pending action in New Mexico state court concerning the same subject matter and parties; (2) the district court erred by denying their motion for a continuance under Fed. R. Civ. P. 56(f) in order to conduct limited discovery on the asserted inconsistent position taken by Allstate in other proceedings concerning the choice of law issue; (3) the district court erred either by failing to consider the choice of law clause in the policy or by misconstruing it, resulting in an incorrect determination that Oklahoma law rather than New Mexico law applied; (4) Allstate is estopped from arguing that Oklahoma choice of law rules apply; and (5) the district court erred in determining that Oklahoma would apply its own law rather than New Mexico law regarding the exclusion in the umbrella policy. We review the grant of summary judgment de novo. *Phillips v. New Hampshire Ins. Co.*, 263 F.3d 1215, 1218 (10th Cir. 2001). We reject defendants' assertions of error.

We review the district court's decision to proceed with the declaratory judgment action for an abuse of discretion. *See Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494-95, 62 S. Ct. 1173, 86 L. Ed. 1620 (1942); *United States v. City of Las Cruces*, 289 F.3d 1170, 1183 (10th Cir. 2002). Under the Declaratory Judgment Act, the "district courts have 'unique and substantial discretion' in determining whether to declare the rights of litigants when duplicative state proceedings exist." *City of Las Cruces*, 289 F.3d at 1179-80 (quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995)). We have previously set out

several "fact-intensive and highly discretionary factors" for district courts to consider. *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 983 (10th Cir. 1994). We do not review the district court's analysis of these factors de novo. *Id.* Rather, "[w]e give the district court's assessment of each factor great deference[,]" *City of Las Cruces*, 289 F.3d at 1183, and "will only ask whether the trial court's assessment of them was so unsatisfactory as to amount to an abuse of discretion," *Mhoon*, 31 F.3d at 983. The district court carefully evaluated the facts of this case in light of the *Mhoon* factors. *See* Aplt. App., Vol. II, Tabs 10, at 3-7. Defendants have not convinced us that the court abused its discretion in deciding to take jurisdiction. We affirm the district court's decision on this point for substantially the same reasons as those stated in the court's April 15, 2008, and May 13, 2008, orders. *See* Aplt. App., Vol. II, Tabs 10, at 3-7, Tab 15.

"We review the district court's denial of a Rule 56(f) request for an abuse of discretion." *Garcia v. U.S. Air Force*, 533 F.3d 1170, 1179 (10th Cir. 2008). Defendants asserted in their motion for a continuance that they needed time to obtain the sealed portions of Allstate's briefing in a New Jersey case because those portions would provide "evidence of ambiguity" in the choice of law provisions in the insurance policies in this case. Aplt. App., Vol. II, Tab 16, at 2. The district court held that defendants failed to make the necessary showing to support their request because extrinsic evidence was not relevant to prove the existence of an ambiguity in policy language and because defendants already had the relevant unsealed portions of Allstate's briefing with which to frame an argument concerning the construction of the policy language. *Id.*, Tab 24, at 5 n.2.

Defendants argue that the district court incorrectly assumed that the policy language at issue was unambiguous. We are not persuaded that the district court abused its discretion in denying their request for a continuance under Rule 56(f) and affirm on this point for substantially the reasons stated by the district court in its June 20, 2008, order. Aplt. App., Vol. II, Tab 24, at 5 n.2.

Because the parties do not dispute the facts, we review the district court's choice of law determination de novo. *Anderson v. Commerce Constr. Servs., Inc.*, 531 F.3d 1190, 1193 (10th Cir. 2008). We also review the district court's construction of the choice of law provisions in the insurance policies de novo. *Level 3 Commc'ns, LLC v. Liebert Corp.*, 535 F.3d 1146, 1154 (10th Cir. 2008). The district court clearly and thoroughly explained why Oklahoma law, not New Mexico law, applies both to the choice of law question and the interpretation of the choice of law provisions in the insurance policies, beginning with the settled proposition that a federal court sitting in diversity applies the choice of law rules of the forum state. Aplt. App., Vol. II, Tab 24, at 3 (citing Tenth Circuit and Supreme Court authority). Like the district court, we are unpersuaded by defendants' argument that Allstate should be estopped from arguing that Oklahoma choice of law rules apply. *See id.* at 5 n.2. We also reject defendants' argument that the district court erred in determining that Oklahoma would apply its own law rather than New Mexico law regarding the exclusion in the umbrella policy. We affirm the district court's analysis and conclusions for substantially the same reasons as those set forth in the district court's June 20, 2008, order. *See id.* at 3-11.

Allstate's Motion for Leave to File Sur-Reply Brief is granted. Allstate's motion to strike defendants' supplemental authority and certain portions of defendants' reply brief is denied.

The judgment of the district court is AFFIRMED.

Entered for the Court

Michael W. McConnell

Circuit Judge

Footnote

*After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Filed: 7/8/2008
(D.C. No. 5:07-CV-01275-HE)
UNITED STATES DISTRICT
WESTERN DISTRICT OF OKLAHOMA

ALLSTATE INSURANCE COMPANY,
Plaintiff,

v.

WILLIAM COVALT, individually, LOREN MORGAN, as personal representative of the estate of Linda Covalt, deceased,
Defendants

JUDGMENT

On April 16, 2008, pursuant to 28 U.S.C. § 2201, Plaintiff Allstate Insurance Company ("Allstate") filed an Amended Complaint (Dkt. No. 24) seeking declaratory judgment against Defendants William Covalt, in his individual capacity, and Loren Morgan, as the Personal Representative of the Estate of Linda Covalt, deceased, with regard to insurance coverage issues arising from an automobile accident on August 15, 2007, involving William Covalt and Linda Covalt. On April 29, 2008, Allstate filed a Motion for Summary Judgment requesting the Court to declare, with regard to said automobile accident, that (1) Allstate's liability to pay damages under the liability coverage of the Automobile Policy (policy number 095660660) is limited to $25,000.00 per person, and $50,000 per occurrence (accident) and (2) Allstate has no liability to pay damages under the Personal Umbrella Policy (policy number 095728569). (Dkt. No. 27.)

Now, upon full consideration of all pleadings, motions, exhibits and arguments of counsel, the Court finds that Allstate's Motion for Summary Judgment should be and is hereby GRANTED. For the reasons stated in the Court's Order dated June 20, 2008, (Dkt. No. 44.), the Court hereby DECLARES the rights of the parties to this action as follows:

(1) Allstate has, no obligation under the liability coverage of the Automobile Policy (policy number 095660660) to pay damages arising from the bodily injury sustained by Mrs. Covalt as a result of the August 15, 2007, accident to the extent said damages exceed $25,000.00; and,

(2) There is no coverage for claims arising from the bodily injury sustained by Mrs. Covalt as a result of the August 15, 2007, accident under the Personal Umbrella Policy (policy number 095728569).

IT IS THEREFORE ORDERED, ADJUGED AND DECREED that judgment is entered in favor of Plaintiff Allstate Insurance Company and against Defendants William Covalt, individually, and Loren Morgan, as the personal representative of the Estate of Linda Covalt, deceased.

IT IS SO ORDERED.

Dated this 8th day of July, 2008.

Filed: 6/20/08
(D.C. No. 5:07-CV-01275-HE)
UNITED STATES DISTRICT
WESTERN DISTRICT OF OKLAHOMA

ALLSTATE INSURANCE COMPANY,
Plaintiff,

v.

WILLIAM COVALT, individually, LOREN MORGAN, as personal representative of the estate of Linda Covalt, deceased,
Defendants

ORDER

Plaintiff, Allstate Insurance Company ("Allstate"), brings this action against defendants, William Covalt, in his individual capacity, and Loren Morgan, as the personal representative of the estate of Linda Covalt. Allstate seeks a declaratory judgment as to the limits of the liability coverage under the automobile insurance policy issued to Mr. and Mrs. Covalt and as to the coverage of the personal umbrella policy issued to the Covalt's daughter, Ladon Covalt. Allstate has filed a motion for summary judgment requesting the court grant it the declaratory judgment it seeks. The motion has been fully briefed by the parties.

Summary judgment is appropriate only when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56 (c). The evidence and any reasonable inferences that might be drawn from it are

viewed in the light most favorable to the nonmoving party. Davidson v. America Online, Inc., 337 F.3d 1179,1182 (10th Cir. 2003). Having applied the Rule 56 standard to determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law," Jeffries v. Kansas, 147 F.3d 1220, 1228 (10th Cir.1998) (internal quotation and citation omitted), the court concludes the plaintiff s motion should be granted.

BACKGROUND

On August 15, 2007, Mr. Covalt was driving and Mrs. Covalt was a passenger when their van was involved in a single car accident, resulting in Mrs. Covalt's death. This accident occurred in New Mexico. Allstate insured the Covalt's van. The automobile insurance policy issued by Allstate provided liability and uninsured motorist coverages. Allstate tendered the uninsured coverage limit of $250,000 to Mrs. Covalt's estate but claimed that, pursuant to the terms of the policy, the liability insurance limit is "stepped down" from $250,000 to the minimum required coverage in Oklahoma of $25,000. Allstate had also issued a personal umbrella policy to LaDon Covalt, which provides general liability protection, under certain conditions, for damages exceeding $100,000. Allstate claims that this policy provides no coverage here because of an applicable exclusion in the policy.

Subsequent to Allstate's filing of this action, Mr. Morgan, as the personal representative of Mrs. Covalt's estate, filed an action in New Mexico state court,

asserting claims for wrongful death against Mr. Covalt and a claim for declaratory judgment against Allstate.

DISCUSSION

I. Conflicts of Law Analysis

Initially, the court must determine what law applies to this dispute. Federal courts exercising diversity jurisdiction make that determination by applying the choice of law rules of the state in which they sit. Progressive Cas. Ins. Co. v. Enegmann, 268 F.3d 985, 987 (10th Cir. 2001) (citing Klaxton Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941)). Oklahoma's choice of law rules apply here.

The automobile and personal umbrella policies both contain choice of law provisions. The automobile policy states:

> What Law Will Apply
>
> This policy is issued in accordance with the laws of Oklahoma and covers property or risks principally located in Oklahoma. Subject to the following paragraph, any and all claims or disputes in any way related to this policy shall be governed by the laws of Oklahoma.
>
> If a covered loss to the auto, a covered auto accident, or any other occurrence for which coverage applies under this policy happens outside Oklahoma[,] claims or disputes regarding that covered loss to the auto, covered auto accident, or other covered occurrence may be

> governed by the laws of the jurisdiction in which that covered loss to the auto, covered auto accident, or other covered occurrence happened, only if the laws of that jurisdiction would apply in the absence of a contractual choice of law provision such as this.

See Doc. # 13-2, p. 39 (emphasis in original). The personal umbrella policy provides:

> What Law Will Apply This policy is issued in accordance with the laws of Oklahoma and covers risks principally located in Oklahoma. Subj ect to the following paragraph, the laws of Oklahoma shall govern any and all claims or disputes in any way related to this policy.
>
> If a covered loss or any other occurrences for which coverage applies under this policy happens outside Oklahoma, claims or disputes regarding that covered loss or any other covered occurrence may be governed by the laws of the jurisdiction in which that covered loss or other covered occurrence happened, only if the laws of that jurisdiction would apply in the absence of a contractual choice of law provision such as this.

See Doc. # 13-3, p.18 (emphasis in original).

Oklahoma law recognizes and applies valid choice of law provisions contained in contracts. See Dean Witter Reynolds, Inc. v. Shear, 796 P.2d 296 (Okla. 1990) (upholding the enforceability of a choice of law provision where the defendant did not challenge the

clause).fn1 Here, the defendants have not challenged the enforceability of the choice of law clauses. Indeed, they rely on portions of these clauses to support their own arguments as to the applicable body of law. It is clear from both choice of law clauses that the parties intended to select Oklahoma law to govern all disputes arising from the policies, unless the covered loss occurred outside Oklahoma and the laws of the jurisdiction where the loss occurred would apply in the absence of the contractual choice of law provisions contained in the policies. If this exception applies, the choice of law provisions direct the application of the law of the jurisdiction where the loss occurred. The question thus becomes whether this exception is applicable here.

To determine what law would apply in the absence of an effective choice of lawclause, Oklahoma has articulated specific principles applicable in the motor vehicle insurance context.fn2 The Oklahoma Supreme Court has held that:

> The validity, interpretation, application and effect of the provisions of a motor vehicle insurance contract should be determined in accordance with the laws of the state in which the contract was made, unless those provisions are contrary to the public policy of Oklahoma, or unless the facts demonstrate that another jurisdiction has the most significant relationship with the subject matter and the parties.

Bohannan v. Allstate Ins. Co., 820 P.2d 787, 797 (Okla. 1991). Here, the parties entered into the insurance agreements in Oklahoma. Defendants have not pointed

to any authority suggesting that the policy provisions at issue here are contrary to Oklahoma's public policy.

Rather, defendants appear to concede that these provisions are enforceable under Oklahoma law. The step-down provision in the automobile policy, by its own terms, does not reduce liability coverage for injury to resident family members below that required by Oklahoma statute. See Hartline v. Hartline, 39 P.3 d 765, 773 (Okla. 2001) ("We hold that the household and named insured/insured exclusions are invalid only when they operate to deny all coverage to an injured resident family member... Compliance with this pronouncement imposes on the insurer the duty to provide in its policy for at least the minimum mandated coverage.") (emphasis omitted).fn[3] Accordingly, Oklahoma's substantive law would apply in the absence of an effective choice of law provision, unless another jurisdiction has the most significant relationship with the subject matter and the parties. Defendants contend that New Mexico has the most significant relationship with the subject matter and the parties.

The most significant relationship test is stated in the Restatement (Second) Conflict of Laws. See Bohannan, 820 P.2d at 795-96. Section 188 of the Restatement provides:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6. fn4

> (2) In the absence of an effective choice of law by the parties..., the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> > (a) the place of contracting,
> > (b) the place of negotiation of the contract,
> > (c) the place of performance,
> > (d) the location of the subject matter of the contract, and
> > (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.
>
> (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in § § 189-199 and 203.

Further, Section 193 states:

> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more

The Comment to § 193 states "[t]he location of the

insured risk will be given greater weight than any other single contact in determining the state of the applicable law provided that the risk can be located, at least principally, in a single state." For an automobile insurance policy, the location of the insured risk is the place where the car will be principally garaged. See § 193, Comment (b); Bohannan, 820 P.2d 787, 796.

Here, the insured vehicle was principally garaged in Oklahoma. The insurance policies were issued in Oklahoma to Oklahoma residents. Mr. Covalt, Mrs. Covalt, the Covalts' daughter, and the personal representative for Mrs. Covalt's estate all are or were residents of Oklahoma. While defendants point to the fact that the accident occurred in New Mexico, this type of contact is of less relevance where the matter at issue is the allocation of risk between an insurer and its insured, based on the interpretation and application of insurance policy provisions and not, for example, the underlying determination of tort liability. Defendants also assert that the public policy of New Mexico, which they argue would invalidate the provisions at issue here,fn5 counsels in favor of the application of New Mexico law. As § 6 of the Restatement provides, the relevant policies of interested states other than the forum are but one of many principles courts must consider. Here, the relative interest of New Mexico, which has only the single contact occasioned by the location of the accident, is less significant. Defendants assertion that the parties' expectations would be best protected by applying New Mexico law is unpersuasive. Both policies clearly state that they are issued in accordance with Oklahoma law and that Oklahoma law generally governs claims or disputes under the policies.

Accordingly, the court concludes that Oklahoma has the most significant relationship with the subject matter of this dispute and with the parties. Oklahoma law would therefore apply in the absence of an effective choice of law clause. As a result, the exception to the choice of law provisions contained in the policies is not applicable here and Oklahoma law, as generally selected by the parties, governs this dispute.

II. Interpretation of the Insurance Policies

Under Oklahoma law, "[w]hen addressing a dispute concerning the language of an insurance policy [the court's] first step is to determine as a matter of law whether the policy language at issue is ambiguous." Cranfill v. Aetna Life Ins. Co., 49 P.3d 703, 706 (Okla. 2002). If the language of the policy is unambiguous, the court accepts the language in its "plain, ordinary and popular sense." Id. No party has pointed to any alleged ambiguity and the court determines that the relevant language in both the automobile policy and the personal umbrella policy is unambiguous so the court will apply the plain meaning of the policy provisions.

A. The Automobile Policy

The automobile policy contains the following exclusion to its liability coverage:

> Exclusions-What Is Not Covered Allstate will not pay for any damages an insured person is legally obligated to pay because of:
>
> 8. bodily injury to any person related to an insured person by blood, marriage, or adoption

> and residing in that person's household, to the extent that the limits of liability for this coverage exceed the limits of liability required by the Oklahoma Financial Responsibility Law.

See Doc. # 13-2, p. 25. The policy's definition of "insured person" includes, among others, the policyholder, the policyholder's resident spouse, and a resident of the policyholder's household. See id., at p. 20 & 24.

The court concludes that Allstate is not obligated, under the liability coverage of the automobile policy at issue, to pay for the bodily injury sustained by Mrs. Covalt as a result of the August 15, 2007, accident to the extent liability exceeds $25,000. There is no genuine dispute that Mrs. Covalt was related to Mr. Covalt by marriage, that she was related to LaDon Covalt by blood or adoption, and that Mr. and Mrs. Covalt and LaDon all resided in the same household.fn6 Therefore, pursuant to the above cited exclusion, Allstate's liability for Mrs. Covalt's bodily injuries is limited to that amount required by the Oklahoma

Financial Responsibility Law, which is $25,000 per person.fn7 As discussed above, the stepdown provision does not violate Oklahoma public policy and is enforceable under Oklahoma law. Accordingly, the liability coverage under the automobile policy for bodily injuries sustained by Mrs. Covalt during the subject accident is limited to $25,000.

B. The Personal Umbrella Policy The personal umbrella policy states:

> General Exclusions-When This Policy Does Not

Apply This policy will not apply:

***

3. to personal injury to an insured.

See Doc. # 13-3, p. 5. The policy further defines "insured" as the person named in the declarations and relatives in that person's household. See id., at p.11.

Again, there is no dispute that LaDon Covalt is the person named in the declarations of the umbrella policy and that Mrs. Covalt was a relative living in the same household as LaDon. Therefore, this exclusion applies and there is no coverage for the subject accident under the personal umbrella policy at issue. As noted above, the exclusion does not contravene Oklahoma public policy and is enforceable. The court concludes that there is no coverage for the August 15, 2007, accident under the personal umbrella policy at issue here.

CONCLUSION

Accordingly, Defendants' motion to stay the motion for summary judgment pending further discovery [Doc. #35] is DENIED. Allstate's motion for summary judgment [Doc. # 27] is GRANTED, with the rights of the parties determined and declared as set forth in this order. The parties are directed to confer and submit a proposed final judgment to the court within ten (10) days of the date of this order.

IT IS SO ORDERED.

Dated this 20th day of June, 2008.

Footnotes

Fn1If a party does challenge a choice of law clause, Oklahoma applies the Restatement (Second) Conflict of Laws § 187 to determine whether the provision is enforceable. Dean Witter Reynolds, Inc., 796 P. 2d at 298-99.

2Defendants contend that plaintiff should be estopped from arguing that Oklahoma conflicts of law principles guide the court's analysis of the law to apply in the absence of the choice of law clauses. They assert that plaintiff argued, in a previous case not involving defendants, that a similar choice of law clause in a different insurance policy required the application of the law of the state where the accident occurred, if that state would apply its own law to the controversy. The court does not view the position taken by plaintiff in the prior case as substantially inconsistent with its position here, hence a basis for application of estoppel is not present. In the prior case, plaintiff argued that New Jersey conflict of law principles applied. New Jersey was not only the location of the accident but, more importantly, was also the state in which the forum federal court sat. Here, this court is a federal court sitting in Oklahoma and therefore applies Oklahoma's choice of law rules.

The court concludes defendants' motion seeking to stay the motion for summary judgment until they obtain a complete copy of plaintiff's briefing in the New Jersey case [Doc. #35] should be denied, as the court concludes the necessary showing under Fed.R.Civ.P. 56(f) has not been made. As plaintiff correctly notes, extrinsic evidence may be pertinent to resolving an ambiguity

otherwise determined to exist in a contract, but is not ordinarily pertinent to establishing the existence of the ambiguity in the first place. See generally, Downtown Airpark, Inc. v. Continental Ins. Co., No. CIV-91-673-L, 1993 WL 815273, at *3 (W.D.Okla. Mar. 22, 1993) (applying Oklahoma law), and cases cited therein. Further, it appears from defendants 'submissions that, to the extent Allstate's posture in the New Jersey case is pertinent here, the portions of the Allstate brief already available to defendants enable them to frame whatever argument they think is applicable in construing the contact language.

fn3The personal umbrella policy is excess liability insurance and was not issued to meet Oklahoma's financial responsibility requirements. See Doc. #13-3, p. 12 ("This policy provides only excess insurance. It does not contribute with any Required Underlying Insurance or other insurance which applies to an occurrence. It also is excess to any Retained Limit an insured assumes.'). The exclusion in the umbrella policy does not operate to deny the minimum mandated amount of coverage.

fn4Section 6 of the Restatement states:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.
significant relationship under the principles stated in §6 to the transaction and the parties, in which event the local law of the other state will be applied.

Fn5It is clear from several New Mexico cases that New Mexico public policy invalidates, in a variety of situations, contractual provisions like those involved here. However, it is considerably less clear whether New Mexico would ultimately apply its public policy to reach the circumstances existing in this case - where the same person, Mr. Covalt, is both the tortfeasor and the ultimate beneficiary (as sole beneficiary of Mrs. Covalt's estate) of the insurance proceeds. See State Farm Mut. Auto. Ins. Co. v. Ballard, 54 P.3d 537, 541 (N.M. 2002) (invalidating a step-down provision and stating "[a]s a matter of public policy, [plaintiff] is as much an `innocent victim ' of the accident as an unrelated individual would be under the policy.").

Fn6 Defendants' suggestion that plaintiff has not sufficiently supported these facts is disingenuous. The attachments to plaintiff's motion for summary judgment, along with numerous other filings in this case, make it abundantly clear that the Covalts and their daughter are related and that they lived in the

same household. Defendants have offered no evidence to dispute this showing.

Fn7 47 Okla. Stat. §§ 7-600 et seq, and 7-204 require all vehicles in Oklahoma to be covered by liability insurance (or other evidence of financial responsibility) of at least $25, 000 for bodily injury to or death of one person in an accident.

Filed: 5/13/2009
(D.C. No. 5:07-CV-01275-HE)
UNITED STATES DISTRICT
WESTERN DISTRICT OF OKLAHOMA

ALLSTATE INSURANCE COMPANY,
Plaintiff,

v.

WILLIAM COVALT, individually, LOREN MORGAN, as personal representative of the estate of Linda Covalt, deceased,
Defendants

ORDER

Loren Morgan, Personal Representative of the Estate of Linda Covalt, has moved to stay or dismiss the present action pending the completion of proceedings in state court in New Mexico. He has also moved to extend the time for his response to plaintiff s motion for summary judgment until this court's ruling on the motion to stay/dismiss.

Mr. Morgan's motion to stay or dismiss is, in substance, a request for reconsideration of the court's earlier decision declining that relief when first sought by defendant Covalt individually. Order, April 15, 2008. The present motion presents nothing that alters this court's previous analysis and determination of the question. The cases Morgan principally relies on, Sam v. Sam, 139 N.M. 474,134 P.3d 761 (2006), and Wamsley v. Nodak Mutual Ins. Co., 341 Mont. 467,178 P.3d 102 (2008), do not support the broad proposition for which

he cites them (that a state court "will recognize laws and judgments of another state only if doing so does not undermine [that state's] own public policy").fn1 Both cases are considerably more nuanced than that and do not, in the circumstances existing here, alter the court's conclusion that permitting a declaratory judgment to go forward here will not improperly encroach on state jurisdiction or increase friction between states.fn2

Defendant Morgan's motion to dismiss or stay these proceedings [Doc. #30] is DENIED. His responsive pleading shall be filed within 10 days of entry of this order. Fed.R.Civ.P.12(a)(4)(A). His motion for extension of time to respond to plaintiff's motion for summary judgment [Doc. #32] is GRANTED so as to make his response due on the same date as his responsive pleading.fn3

IT IS SO ORDERED.
Dated this 13th day of May, 2008.

1Indeed, Wamsley repeatedly states the contrary.

2 Determination of the propriety of a declaratory judgment action is not the same inquiry as full faith and credit or similar determinations in other contexts. However, to the extent the concerns underlying a full faith and credit or similar analysis apply here, it is worth noting that none of the parties in this case are New Mexico residents. Moreover, while both parties in this case are plainly mindful of the impact of applying either Oklahoma or New Mexico law to the pertinent inquiry, plaintiff has not engaged in the sort of forum shopping or procedural fencing that concerned the court in Wamsley.

3This schedule, in light of the timing of the entry of this order, appears to avoid the various scheduling conflicts referenced by Morgan's counsel.

Filed: 4/15/2008
(D.C. No. 5:07-CV-01275-HE)
UNITED STATES DISTRICT
WESTERN DISTRICT OF OKLAHOMA

ALLSTATE INSURANCE COMPANY,
Plaintiff,

v.

WILLIAM COVALT, individually, LOREN MORGAN, as personal representative of the estate of Linda Covalt, deceased,
Defendants

ORDER

Plaintiff, Allstate Insurance Company ("Allstate"), brought this action against defendant, William Covalt, individually and as the surviving spouse of Linda Covalt, seeking a declaratory judgment as to the limits of the uninsured motorist coverage under the automobile insurance policy issued to the Covalts. Mr. Covalt has filed a motion to dismiss this action or, alternatively, to stay this proceeding, asserting that this court should abstain from deciding the current lawsuit while related litigation in a New Mexico state court is pending. Allstate has filed a motion for leave to substitute Loren Morgan, the appointed personal representative of Mrs. Covalt's estate, for Mr. Covalt in his capacity as the surviving spouse of Mrs. Covalt' and to add a claim for a declaratory judgment that there is no coverage under a personal umbrella policy issued to Ladon Covalt, Mr. and Mrs. Covalt's daughter. These motions have been fully briefed.

BACKGROUND

On August 15, 2007, Mr. Covalt was driving and Mrs. Covalt was a passenger when their van was involved in a single car accident, resulting in Mrs. Covalt's death. This accident occurred in New Mexico. Allstate insured the Covalt's van. The insurance policy issued by Allstate provided liability and uninsured motorist coverages. Allstate tendered the uninsured coverage limit of $250,000 to Mrs. Covalt's estate but claimed that, pursuant to the terms of the policy, the liability insurance limit is "stepped down" from $250,000 to the minimum financial responsibility in Oklahoma of $25,000.

After some discussion between the parties and their counsel, Allstate filed the instant lawsuit naming Mr. Covalt on November 13, 2007. Shortly before the filing of this action, Mr. Covalt's counsel represented to Allstate's counsel that no personal representative had been appointed for the estate. Mrs. Covalt's will named Mr. Covalt as her sole beneficiary and appointed him as the personal representative. Initially, in his probate petition, Mr. Covalt consented to appointment as the estate's personal representative. After Allstate filed this action, Mr. Covalt waived his right to be the personal representative and nominated Loren Morgan.

On December b, 2007, Mr. Morgan, as the personal representative of Mrs. Covalt's estate, filed a complaint for wrongful death naming Mr. Covalt as the defendant in New Mexico state court. Subsequently, Mr. Morgan filed two amended complaints in the New Mexico case, adding Allstate as a defendant and adding a claim for a declaratory judgment that the "step-down" provision in

the insurance policy cannot be enforced because it violates New Mexico public policy.

At some point, Mr. Covalt became aware that Allstate had also issued a personal umbrella policy to Ladon Covalt, which provides general liability protection, under certain conditions, for damages exceeding $100,000.

DISCUSSION

I. Motion to Substitute Party and for Leave to Amend Complaint

The court concludes that Allstate's motion to substitute Mr. Morgan for Mr. Covalt in his capacity as the surviving spouse of Mrs. Covalt and to add a claim for declaratory relief as to the personal umbrella policy should be granted. At the time of the filing of this action, Mr. Covalt was the proper party to name as the representative of Mrs. Covalt's estate and Allstate has filed a timely motion upon discovering that a personal representative was appointed for the estate. Further, the court concludes that, pursuant to Fed.R.Civ.P.15(a)(2). Allstate should be granted leave to amend its complaint to add the additional claim for declaratory judgment.

II. Motion to Dismiss

Mr. Covalt argues that this court should decline to exercise its jurisdiction over the declaratory judgment action. The Tenth Circuit has adopted a list of factors that a district court should consider when deciding whether to exercise jurisdiction over a declaratory

judgment action. Those factors are:

[1] whether a declaratory action would settle the controversy; [2] whether it would serve a useful purpose in clarifying the legal relations at issue; [3] whether the declaratory remedy is being used merely for the purpose of procedural fencing or to provide an arena for a race to res judicata; [4] whether use of declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and [5] whether there is an alternative remedy which is better or more effective.

United States v. City of Las Cruces, 289 F.3d 1170, 1187 (10th Cir. 2002) (quoting State Farm Fire & Cas. Co. v. Mhoon, 31 F.3d 979, 983 (10th Cir.1994)).

The court concludes that the first two Mhoon factors whether the declaratory action would settle the controversy and clarify the legal relations at issue weigh in favor of exercising jurisdiction over this action.Though Mr. Covalt argues that the proper representative of Mrs. Covalt's estate is not before the court and that the personal umbrella policy is not at issue here, the court has concluded that Allstate's motion for leave to substitute party and to amend its complaint should be granted. Accordingly, Mr. Covalt's arguments as to these points are moot. Once the amended complaint is filed, the court will have all parties and all claims relevant to the determination of insurance coverage before it. The only issue not before the court will be Mr. Covalt's tort liability to Mrs. Covalt's estate. However, it appears there is little, if any, dispute as to his liability and, in any event, Mr. Covalt is both the alleged tortfeasor and the beneficiary

of Mrs. Covalt's estate. Ultimately, he will receive whatever amount is awarded to the estate based on his negligence so the only real question that remains is how much Allstate will have to pay the estate under the insurance policies. The absence of the tort claim will not affect the court's ability to provide complete relief to the parties as to this issue.

The factor as to whether a state remedy would be better or more efficient likewise weighs in favor of the court proceeding with this case. There is some uncertainty as to whether the claim for declaratory relief against Allstate in the New Mexico court is properly brought. See Rhodes v. Lucero, 444 P.2d 588 (N.M.1968) (affirming trial court's dismissal of plaintiffs claim for declaratory judgment that defendant's insurance policy covers defendant because plaintiff held no judgment against defendant and plaintiffs rights of recovery against defendant were contingent). If the New Mexico court determines that the claim for declaratory relief is premature under state law, the ability of the parties to resolve the issue of insurance coverage, which is, as stated above, the only real question at issue, could be significantly delayed. Further, as noted above, a declaration of the parties' rights by this court will provide all of the parties complete relief as to the insurance coverage issue.

The use of a declaratory action would not increase friction between federal and state courts and would not improperly encroach upon state jurisdiction. There is no issue raised by the current proceedings that is traditionally reserved for the states. Despite Mr. Covalt's argument as to the McCarran-Ferguson Act, 15 U. S.C. § § 1011 & 1012, the declaratory judgment

action does not raise questions as to the regulation of the insurance industry. Rather, Allstate seeks a declaration as to the extent of its liability under the insurance policies at issue, which is an appropriate use of the Declaratory Judgment Act. See Farmers Alliance Mut. Ins. Co. v. Jones, 570 F.2d 1384,1386 (10th Cir.1978) ("Declaratory judgment actions are seen as useful in actions wherein insurance companies seek to have their liability declared .... We have expressly recognized that one of the primary functions of the [Declaratory Judgment] Act is to provide the insur[e]r such a forum.") (internal citation omitted). Here, where the court will have to decide which state's law or public policy should apply, the use of a federal forum, as opposed to a state forum in either "competing" state, may be particularly appropriate.

Further, resolving this dispute in a forum located in Oklahoma rather than in New Mexico is not inefficient or otherwise troublesome given the multitude of contacts with this state. Both of the insurance policies in dispute were issued in Oklahoma. The automobile policy states that the liability insurance is provided "in accordance with coverage required by the Compulsory Insurance Law of Oklahoma." Mr. Covalt, one of the policyholders, the alleged tortfeasor, and the sole beneficiary of Mrs. Covalt's estate, is a citizen of Oklahoma. Mrs. Covalt was also an Oklahoma citizen. The estate's personal representative is a citizen of Oklahoma and the estate's primary counsel is located in Oklahoma. The insured van that was involved in the accident was principally garaged in Oklahoma. The only apparent contact with New Mexico is that the car accident occurred there.

Consideration of whether the declaratory remedy is being used merely for the purpose of procedural fencing or to provide an arena for a race to res judicata counsels in favor of this court exercising jurisdiction over this action. To the extent either party has engaged in procedural fencing or forum shopping, the court concludes that Mr. Covalt and his counsel have done at least as much, if not more, than Allstate and its counsel. While Mr. Covalt attempts to characterize Allstate's conduct surrounding the filing of this lawsuit as less than above-board, it is clear that Allstate did in fact give Mr. Covalt's attorney notice of its belief that Oklahoma law applied to the insurance policy and of its intent to file a federal declaratory judgment action in Oklahoma.' In that notice, Allstate proposed the possibility of the parties submitting the dispute to the court based on stipulated facts. Further, Mr. Covalt initially sought appointment as the personal representative of his wife's estate, but at some point, presumably after he realized the impact that his appointment might have on the estate's claim against him, backed off and agreed to the appointment of Mr. Morgan. Then, after Allstate had already filed its declaratory judgment action, the estate filed the tort action in New Mexico, a forum that appears less convenient to it and its principals and with little connection to the dispute apart from being the location of the accident.

After consideration of the Mhoon factors, the court concludes that it should exercise its jurisdiction to hear this declaratory judgment action.

CONCLUSION

Accordingly, Mr. Covalt's motion to dismiss or, alternatively, to stay the current proceedings [Doc. # 8] is DENIED. Allstate's motion for leave to substitute party and to amend its complaint [Doc. # 12] is GRANTED. Allstate is directed to file an amended complaint by April 24, 2008. IT IS SO ORDERED. Dated this 15th day of April, 2008.

Footnotes

1Mr. Covalt would remain a defendant in his individual capacity.

2Mr. Covalt states in his motion to dismiss that Allstate filed this action the day after noting his counsel that Allstate believed Oklahoma law applied to the insurance policy. The affidavit of Mr. Covalt's counsel and the exhibit attached thereto do not support this assertion. These materials indicate that Allstate's counsel faxed a letter stating its position as to the application of Oklahoma law to Mr. Covalt's counsel on November 9, 2007. The complaint in this case was filed on November 13, 2007.

Filed: 4/27/09
Nos. 08-6169 & 08-6170
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ALLSTATE INSURANCE COMPANY,
Plaintiff-Appellee,

v.

WILLIAM COVALT, individually, LOREN MORGAN, as personal representative of the estate of Linda Covalt, deceased,
Defendants-Appellants.

ORDER

Before McCONNELL, McKAY, and GORSUCH, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court ho are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

DEC 20 2007
No. D 424 CV- 200700108
FOURTH JUDICIAL DISTRICT COURT
COUNTY OF GUADAULPE
STATE OF NEW MEXICO

LOREN MORGAN, as personal representative of the Estate of Linda E. Covalt,
Plaintiff,
V.
WILLIAM D. COVALT and ALLSTATE INSURANCE COMPANY, Defendants.

SECOND AMENDED COMPLAINT FOR WRONGFUL DEATH AND FOR DECLARATORY JUDGMENT

Plaintiff, Loren Morgan, as personal representative of the Estate of Linda E. Covalt, by and through his attorney, Daymon B. Ely, brings this lawsuit and states:

Count One - Wrongful Death

1. Loren Morgan is a resident and citizen of Oklahoma.
2. Defendant William D. Covalt is a resident and citizen of Oklahoma. On information and belief, Allstate Insurance Company is a foreign insurance company doing business in New Mexico.
3. The accident giving rise to this accident occurred in Guadalupe County, State of New Mexico.
4. On or about August 15, 2007, Mr. Covalt was driving a vehicle in which Linda Covalt was a passenger. Mr. Covalt was negligent in his operation of

the vehicle.

5. As a direct and proximate result of his negligence, Ms. Covalt died and the Estate is entitled to damages permissible under New Mexico's Wrong Death Act, 41-2-et. seq.

Count Two -Declaratory Judgment

6. Plaintiff incorporates, by reference, the facts and allegations set forth above.

7. On information and belief, Mr. Covalt had automobile insurance with Defendant Allstate Insurance Company.

8. On information and belief, Allstate Insurance Company provided liability coverage in the amount of $250,000 or greater.

9. Allstate Insurance Company has a "step-down" provision in any policy which, under Oklahoma law, might reduce the liability coverage to $25,000 because the lawsuit involves family members.

10. Plaintiff seeks a declaratory judgment that such a "step-down" provision cannot apply in this case because such a provision, among other things, violates New Mexico's public policy. Therefore, the liability coverage in this matter is not reduced by any policy provision. WHEREFORE, Plaintiff prays for judgment as follow:

1. Against the Defendant Covalt in an amount reasonable to compensate the estate of Linda Covalt for her death, for costs, interest, including pre-judgment interest, and such other relief as this Court may deem appropriate; and

2. A declaratory judgment against Allstate Insurance Company that there is liability

coverage which is not reduced by any policy provision, for costs, interest, including pre judgment interest, and such other and further relief as this Court may deem appropriate.

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1228 Central Ave., S.W.
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Filed: 10/17/2008
No. D 424 CV- 200700108
FOURTH JUDICIAL DISTRICT COURT
COUNTY OF GUADAULPE
STATE OF NEW MEXICO

LOREN MORGAN, as personal representative of the Estate of Linda E. Covalt,
Plaintiff,
V.
WILLIAM D. COVALT and ALLSTATE INSURANCE COMPANY, Defendants.

DEFENDANT ALLSTATE INSURANCE COMPANY'S MEMORANDUM MOTION FOR SUMMARY JUDGMENT

Defendant Allstate Insurance Company ("Allstate") respectfully requests this Court to enter judgment in its favor as to Plaintiffs Count II claim for Declaratory Judgment in Plaintiff's Second Amended Complaint for Wrongful Death and for Declaratory Judgment. As discussed more fully below. Plaintiffs claim for declaratory relief has been resolved in a full and final judgment entered in the United States District Court of the Western District of Oklahoma in Allstate Ins. Co. v. Covalt, No. CIV-07-1275-HE (W.D. Okla.) on July 8, 2008, attached hereto as Exhibit A. Pursuant to New Mexico's Foreign Judgments Act, §§ 39-4A-1-39-4A-6 NMSA 1978, that judgment has been domesticated through a Notice of Filing Foreign Judgment, filed in Allstate Ins. Co. v. Loren Morgan, as Personal Representative of the Estate of Linda E. Covalt and William Covalt, No. D-424-CV-200800055, attached hereto as Exhibit B. Since that judgment is

entitled to fall faith and credit under New Mexico law, judgment should be entered as to Plaintiff's claim for declaratory judgment in this case.

STATEMENT OF UNDISPUTED FACTS.

1. This case arises out of a single-vehicle accident in which William Covalt, an Oklahoma resident, fell asleep while driving during the early morning hours of August 15, 2007, resulting in the death of his Oklahoma resident wife, Linda Covalt, who was a passenger in the vehicle. Second Amended Complaint, Par. 4.

2. Mr. Covalt, as the, sole beneficiary and designated personal representative of his wife estate, made a claim for benefits under an Allstate automobile insurance policy issued in Oklahoma. See April 15, 2008 opinion entered in Allstate Ins. Co. v. William Covalt, individually and as surviving spouse of Linda Coialt, deceased, No. CIV-07-1275-HE (W.D. Okla, Apr. 15, 2008), at 2, attached hereto as Exhibit C.

3. On November 13, 2007, Allstate filed a declaratory judgment action in federal court in Oklahoma seeking a declaration as to the amount of coverage available. wider the, policy. Id, at 2.

4. On December 6, 2007, Loren Morgan, an Oklahoma resident, as Personal Representative to the Estate of Mrs. Covalt, an Oklahoma resident, filed this case, originally styled as a tort action against Mr. Covalt for the wrongful death of Mrs. Covalt. On December 17, 2007, Mr. Morgan filed a First Amended Complaint, naming Allstate Insurance Company as a co-defendant and seeking a declaratory judgment as to

the amount of coverage available under the Allstate Oklahoma automobile policy.

5. The Oklahoma federal district court granted Allstate's motion for summary judgment in an Opinion entered June 20, 2008. See June 20, 2008 opinion entered in Allstate Ins. Co. v. William Covalt, individually and as surviving spouse of Linda Covalt, deceased, No. CIV-07-1275HE (W.D. Okla. June 20, 2008), attached hereto as Exhibit D. The Court entered final judgment on July 8, 2008. Exhibit A hereto. Morgan has appealed that final Judgment.

6. On July 28, 2008, Allstate filed a certified copy of that judgment of record in Fourth Judicial District Court, No. D-424-CV200800055, pursuant to New Mexico's Foreign Judgments Act, §39-4A-3(A) NMSA 1978. Exhibit B hereto.

ARGUMENT

I. THE JUDGMENT ENTERED IN OKLAHOMA IS ENTITLED TO FULL FAITH AND CREDIT IN NEW MEXICO.

The United States Constitution states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. 4, § 1. New Mexico law repeatedly confirms New Mexico's adherence to the principles inherent in the U.S. Constitution's Full Faith and Credit Clause: "Full faith and credit generally requires every state to give the final judgments of sister states 'at least the res judicata effect which the judgment would be accorded in the State which

rendered it.'" Conglis v. Radcliffe, 119 N.M. 287, 289, 889 P.2d 1209, 1211 (1995) (quoting Durfee v. Duke, 375 U.S. 106, 109 (1963)).

Indeed, the full faith and credit clause of the United States Constitution limits the power of a court to reopen or vacate a foreign judgment, and foreign judgments cannot be collaterally attacked on the merits. Jordan v. Hall, 115 N.M. 775, 777, 858 P. 2d 863, 865 (Ct. App. 1993). Therefore, this Court lacks authority to "reconsider" a judgment entered in another jurisdiction.

Moreover, the New Mexico Foreign Judgments Act codifies the, deference that must be accorded to a judgment entered in another Jurisdiction after it has been filed, as this one has, in state court in New Mexico: "A judgment so filed shall have, the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, staying enforcing or satisfying as a judgment of the district court of this state, and may be enforced or satisfied in like manner." §39-4A-3(A) NM. 1978. The New Mexico Foreign Judgments Act is based on the Uniform Enforcement of Foreign Judgments Act. The purpose of that bet "is to provide a speedy and economic means of accomplishing that which the United States Constitution's Full Faith and Credit Clause requires of the states." Conglis v. Radcliffe, 119 N.M. at 289, 889 P.2d at 1211.

To effectuate, those well-established constitutional and statutory principles, "New Mexico courts accord fall faith and credit to the judgments of sister states, unless the, judgment is void." Miller v. Morrison, 2008 NMCA 92, Par. 5, 189 P.3d 676. For that

rea-son, New Mexico law recognizes only limited bases for challenging the validity of a judgment., "such a challenge must rest on one of the grounds that justifies the denial of fall faith and credit, such as lack of Jurisdiction, lack of due process, or extrinsic fraud," Conglis, 119 N.M. at 289, 889 P.2d at 1211. See also Jordan v, Hall, 115 N. M. at 778, 85 8 P. 2d at 866 ("Only the, defenses of fraud or lack of jurisdiction may be raised to destroy the full faith and credit owed a foreign judgment.

None of these limited bases for challenging the validity of a judgment applies in this case, Mr. Morgan is an Oklahoma resident, serving as personal representative for the Estate of Linda Covalt, which is an Oklahoma Estate. Before her death, Linda Covalt was an Oklahoma resident, and she and her husband, William Covalt, purchased the Oklahoma Allstate Insurance Company policy in Oklahoma to insure vehicles garaged in Oklahoma. Exhibit D, at 5. Therefore, the Oklahoma district court had jurisdiction over the parties and the subject matter of the dispute there, The Estate vigorously litigated the precise questions it seeks to relitigate in New Mexico, so the Estate camot argue that due process was somehow lacking. Nor can the Estate argue that the Judgment was somehow procured by fraud. Therefore, the, Motion should be denied on that basis alone.

The Estate undoubtedly disagrees with the conclusions reached by the Oklahoma court and would argue that the Oklahoma federal court erred when it entered the judgment in that case. However, New Mexico law holds that absent proof of one of the few, recognized recognized challenges to enforcement of a

foreign judgment, that judgment should be enforced, even if it is wrong.fn1 Thoma v. Thoma, 1997-NMCA-16, Par. 13, 934 P.2d 1066, 1069 ("Once the New Mexico court discovered that the Oklahoma court had made, a determinaiton, after full and fair litigation, the Oklahoma, court's determination was entitled to fall faith and credit even if it was erroneous"), cert. denied (1997). See also Delaney v. First Nat'l Bank in Albuquerque, 73 N.M. 192, 196, 386 P.2d 711, 714 (1963) ("the fact that a judgment entered by a foreign court could not have been entered by a New Mexico court, because it would have offended the public policy of New Mexico, will not pernilt the courts of New Mexico to deny it full faith and credit as required under Art. IV, § 1, U.S. Constitution.").

There simply is no "public policy" exception to the requirement that a state court give, the, judgment of another state full faith and credit. See, e.g., Craven v. Southern Farm Bureau Cas. Ins. Co., 117 P. 3d 11, 14 (Colo. App. Div. IV 2004) ("The, language of the Full Faith and Credit Clause does not -reflect an exception based on the public policy of the recognition state ... Moreover, the United States Supreme Cowl has ruled that there is no public policy exception to the Full Faith and Credit Clause as it relates to judgments of a sister state."), citing Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998)). See also Martin v. SAIF Corp., 167 P.3d 916, 919 (Mont. 2007) ("Montana's firm public policy dictates against subrogation claims until after the, worker is made, whole. No public policy exception exists, however, to the, full faith and credit accorded to final judgments."); Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007) (full faith and credit required Oklahoma to recognize an adoption by a same-sex couple that was

already fomialized in another state, even though an Oklahoma statute specifically prohibited such adoptions on public policy grounds); Soc'y of Lloyd's v. Mullin, 255 F. Sup. 2d 468, 476 (E.D. Pa. 2003) ("The fact that Pennsylvania courts might reach a different conclusion if the same breach of contract action were pursued in Pennsylvania does not mean the 'cause of action' asserted in the English Judgment is repugnant to Pennsylvania public policy,"); Mason v. Mason, 775 N.E.2d 706, 708 (Ind. App. 2002) (trial court properly gave fall faith and credit to marriage that was legal under Tennessee law event though marriage between cousins was illegal under Indiana law); Remington Investments, Inc. v. Obenauf, 1 S.W.3d 666, 669 (Tenn. App. 1999) (enforcing Connecticut judgment in Tennessee where same parties had opportunity to raise the same arguments, but failed to do so, in Connecticut state court); Southwest Livestock & Trucking Co., Inc. v. Ramon, 169 F.3d 317, 323 (5th Cir. 1999) (requiring recognition of Mexico Judgment that violated Texas anti-usury law); Bank of Am. v. Jennett, 77 Cal. App. 4th 104, 118 (Cal. App. 3d Dist, 1999) (giving full faith and credit to Hawaii judgment, because "As long as the sister state court had jurisdiction over the subject matter and the parties, a sister state Judgment is entitled to full faith and credit 'even as to matters of law or fact erroneously decided."').

Nor does the fact that the court originally entering Judgment was a federal court, and this is a state court, make any difference to the analysis: "the judgments of the courts of the United States have invariably been recognized as upon the, same footing, so far as concerns the obligation created by them, with domestic Judgments of the States, whenever rendered

and whenever sought to be enforced." Embry v. Palmer, 107 U.S. 3, 10, 17 Otto 3, 27 L. Ed. 346, 2 S. Ct. 25 (1882). Indeed, in Moffat v. Branch, 2005-NMCA-103, Par. 19, 138 N.M. 224, 230-31, 118 P. 3d 732, 738-39, the New Mexico Court of Appeals accorded res judicata effect to a grant of summary judgment by the United States District Court for the District of New Mexico, holding that the federal court's grant of summary Judgment on an attorney's request for a charging lien precluded a subsequent lawsuit by that attorney under a breach of contract theory. See also Great Oil Basin Securities Corp. v,. Union National Bank of Little Rock, 579 S.W.2d 322, 326 (Tex. Civ. App. 1979) (giving effect to federal court judgment in state court action).

Thus, since none of the limited bases for avoidance of the effect of a foreign Judgment apply, this Court should give full faith and credit to the judgment entered by the Oklahoma federal court and enter judgment in favor of Allstate as to the claims in Plaintiffs Complaint against Allstate, because all such claims have, been resolved in the Oklahoma action.

II. THE PENDENCY OF THE APPEAL OF THE OKLAHOMA JUDGMENT DOES NOT AFFECT THE FINALITY OF THAT JUDGMENT.

The fact that the Estate has appealed the Judgment entered by the federal district court does not change this Court's analysis, and that judgment is still entitled to fall faith and credit. New Mexico cases consider a judgment to be final and afforded full faith and credit if the judment would be considered fnal in the court where. the decision was rendered. See

Conglis v. Radcliffe, 119 N.M. 287, 289, 889 P.2d 1209,1211 (1995).

Under fedcral law, a district court judgment is final even when an appeal has been taken. Ruyle v. Continental Oil Co., 44 F.3d 837, 846 (10th Cir. 1994) ("Under the federal view, the pendency of an appeal does not prevent application of the col)ateral estoppel doctrinc walc the appeal involves a full trial de novo"), cert. denied, 516 U.S. 906 (1995); Casias v. Southwest Med. Assocs., 2005 U.S. Dist. LEXIS 39006 (D.N.M. Oct. 31, 2005) (giving effect to New, Mexico state court grant of summary judgment, notwithstanding the pendency of an appeal of that judgment).

This view is also espoused in the Restatement of Judgments:

> A judgment otherwise final remains so despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo; finality is not affected by the fact that the taking of the appeal operates automatically as a stay or supersedeas of the judgment appealed ftorn that prevents its execution or enforcement, or by the fact that the appellant has actually obtained a stay or supersedeas pending appeal.

Restatement (Second) of Judgments § 13, cmt. f (1982). New Mexico has adopted this precise view of finality. See Brunacini v. Kavanagh, 117 N.M. 122, 128-29 869 P.2d 821, 827, 828 App. 1993)("The better view is that a judgment otherwise final remains so despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo", citing Restatement (Second)

of Judments § 33, cmt. f.).

Furthermore, the question of whether a judgment issued by a federal district court is final is a procedural question, so federal and not state law applies here. In Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1329, 1332-1333 (10th Cir. 1988), the court directly confronted the issue whether federal law or state law regarding res judicata should be applied in successive diversity actions in federal court. The court was forced to determine whether the issue of finality ought to be, considered substantive or procedural. The court ultimately determined that finality is a procedural matter and therefore federal rules regarding res judicata are applicable. Id. In so holding, the court stated ... [s]ome aspects of the rules of res judicata reflect primarily procedural policies, Thus, the basic rules of claim and issue preclusion in effect define finality and hence go to the essence of the judicial function."' Id. (quoting Section 87 of the Restatement (Second) of Judgments (1982)).

Accordingly, the fact that the Estate has chosen to appeal the judgment of the Oklahoma federal district court does not alter the requirement that this Court give full faith and credit to that judgment. The Estate's attempt to persuade this Court to "reconsider" a valid judgment entered in another jurisdiction is without legal basis and should be denied and the judgment entered on July 8, 2008 should be enforced.

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P. A.

Footnote

fn1 Here, of course, Allstate firmly believes that the Oklahoma district court correctly ruled that w well-established Oklahoma law applied to the interpretation of an automobile insurance policy issued in Oklahoma to Oklahoma residents covering automobiles garaged in Oklahoma.

12/1/08
No. D 424 CV- 200700108
FOURTH JUDICIAL DISTRICT COURT
COUNTY OF GUADAULPE
STATE OF NEW MEXICO

LOREN MORGAN, as personal representative of the Estate of Linda E. Covalt,
Plaintiff,
V.
WILLIAM D. COVALT and ALLSTATE INSURANCE COMPANY, Defendants.

ORDER

IS MATTER, having come before the Court on Defendant Allstate's Motion for Summary Judgment, and the Court having considered the parties' written and oral arguments, finds that for the reasons stated in open court, the Court declines to accord full faith and credit to the judgment entered by the Oklahoma federal Court and therefore, ORDERS that Allstate's Motion for Summary Judgment is denied.

Filed 12/5/2008

IN THE SUPREME COURT OF NEW MEXICO

ALLSTATE INSURANCE COMPANY,
Petitioner

v.

HONORABLE EUGENIO S. MATHIS,
Respondent

VERIFIED PETITION FOR WRIT OF SUPERINTENDING CONTROL AND/OR MANDAMUS AND/OR PROHIBITION AND REQUEST FOR STAY

***

Petitioner Allstate Insurance Company ("Allstate") respectfully petitions this Court, pursuant to Rule 12-504, NMRA 2004, to issue a writ of prohibition, or alternatively, superintending control or alternatively, mandamus to secure immediate relief from the serious and irreparable harm caused by the oral ruling by Respondent, the Honorable Eugenio S. Mathis, Judge of - the Fourth Judicial District Court, issued at a hearing on November 10, 2008. See Order entered December 1, 2008 and Transcript of November 10, 2008 hearing, both attached hereto. In that decision, Respondent refused to give full faith and credit to a final judgment entered in the United States District Court of the Western District of Oklahoma in Allstate Ins. Co. v. Covalt, No. CIV-07-1275-HE (W.D. Okla.) on July 8, 2008, attached hereto as Exhibit A. Pursuant to New Mexico's Foreign Judgments Act, §§ 39-4A-1 - 39-4A-

6 NMSA 1978, that judgment was domesticated through a Notice of Filing Foreign Judgment, filed in Allstate Ins. Co. v. Loren Morgan, as Personal Representative of the Estate of Linda ECovalt and William Covalt, No. D-424-CV-200800055, attached hereto as Exhibit B. There were no circumstances justifying Respondent's refusal to accord full faith and credit to that judgment, so Respondent's refusal to follow clear New Mexico law justifies issuance of an extraordinary writ. Furthermore, all proceedings in this case should be stayed pending resolution of this Petition.

I. STATEMENT OF JURISDICTION.

This Court has original and exclusive jurisdiction in matters involving the Court's powers of prohibition, superintending control, and mandamus over Respondent, an inferior court. N.M. Const., art. VI, § 3. Indeed, this Court has recognized since territorial days that the writ of prohibition is the appropriate remedy to prevent a lower court from acting in excess of its jurisdiction. Lincoln Lucky & Lee Mining Co. v. District Court, 7 N.M. 486, 38 P. 580 (1894); State ex rel. Miller v. Tackett, 68 N.M. 318, 322, 361 P.2d 724, 727 (1961) ("prohibition will lie where the court is exceeding its jurisdiction, even though it had jurisdiction of the parties and generally of the subject matter."); Sparks v. Caldwell, 104 N.M. 475, 723 P.2d 244 (1986) (granting writ of prohibition when district court erroneously denied a motion to dismiss for lack of personal jurisdiction). This Petition could not lawfully have been made to another court, since no other court has the powers of mandamus, prohibition and superintending control

over Respondent. State ex rel. Townsend v. Court of Appeals, 78 N.M. 71, 428 P.2d 473 (1967) (Court of Appeals may not issue such writs); N.M. Const. Art. VI, § 13 (district courts may not issue writs to judges or courts of equal jurisdiction).

Furthermore, a writ may also be appropriate "even when there is a remedy by appeal, where it is 'deemed to be in the public interest to settle the question involved in the earliest possible moment." State ex rel. Schwartz v. Kennedy, 120 N.M. 619, 624, 904 P.2d 1044, 1049 (1995); Racing Comm'n v. McManus, 82 N.M. 108, 110, 476 P.2d 767, 769 (1970); State ex rel. Tax Commission v. First Judicial District Court, 69 N.M. 295, 302, 366 P.2d 143, 148 (1961). As discussed below, all of the factors for the Court to exercise its discretion and issue an extraordinary writ are present here.

II. REAL PARTIES IN INTEREST.

The Real Parties in Interest are Loren Morgan, as personal representative of the Estate of Linda E. Covalt, and William D. Covalt, the surviving spouse of Linda E. Covalt, and the alleged tortfeasor. Mr. Morgan is an Oklahoma resident serving as personal representative for the Estate of Linda Covalt, which is an Oklahoma Estate. Linda Covalt was an Oklahoma resident, and William Covalt is also an Oklahoma resident. There are no New Mexico real parties in interest.

III. A WRIT IS NECESSARY AND PROPER TO IMMEDIATELY CORRECT RESPONDENT'S RULING.

The Full Faith and Credit clause of the United States Constitution, article IV, section 1, states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." (Emphasis added). The United States Supreme Court has repeatedly emphasized the importance of this constitutional principle: "The very purpose of the full, faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." Milwaukee County v. M.E. White Co., 296 U.S. 268, 276-77 (1935). Accordingly, "[a] final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." Baker by Thomas v. General Motors Corp., 522 U.S. 222, 233 (1998).

New Mexico law confirms New Mexico's adherence to the principles inherent in the U.S. Constitution's Full Faith and Credit Clause: "Full faith and credit generally requires every state to give the final judgments of sister states at least the res judicata effect which the judgment would be accorded in the State which rendered it.'" Conglis v. Radcliffe, 119 N.M. 287, 289, 889 P.2d 1209, 1211 (1995) (quoting Durfee v. Duke, 375 U.S. 106, 109 (1963)).

Moreover, the New Mexico Foreign Judgments Act codifies the deference that must be accorded to a judgment entered in another jurisdiction after it has been

filed, as this one has, in state court in New Mexico: "A judgment so filed shall have the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, staying, enforcing or satisfying as a judgment of the district court of this state and may be enforced or satisfied in like manner." § 39-4A-3(A) NMSA 1978. The New Mexico Foreign Judgments Act is based on the Uniform Enforcement of Foreign Judgments Act. The purpose of that Act "is to provide a speedy and economic means of accomplishing that which the United States Constitution's Full Faith and Credit Clause requires of the states." Conglis v. Radcliffe, 119 N.M. at 289, 889 P.2d at 1211.

Notwithstanding the clear applicability of that well-established law to this case, Respondent refused to give full faith and credit effect to the final judgment issued by the Oklahoma court, even after Allstate properly domesticated that judgment pursuant to New Mexico law. That egregious error must be corrected without delay.

A. Factual Background.

This case is the second filed lawsuit arising out of a tragic single-vehicle accident in which William Covalt, an Oklahoma resident, fell asleep while driving during the early morning hours of August 15, 2007, resulting in the death of his Oklahoma resident wife, a passenger in the vehicle, which was registered and principally garaged in Oklahoma. The accident occurred on Interstate 40 in New Mexico, as the couple was returning to their home in Oklahoma. Mr. Covalt, as the sole beneficiary and designated personal representative of his wife's estate, made a claim for

benefits under an, Allstate automobile, insurance policy issued in Oklahoma. Following negotiation between the parties as to the amounts due under the policy, Allstate filed a declaratory judgment action in federal court in Oklahoma, seeking a declaration as to the amount of insurance coverage available. Allstate filed that action on November 13, 2007.

On December 6, 2007, Loren Morgan, an Oklahoma resident, as Personal Representative to the Estate of Mrs. Covalt, filed this case as a tort action against Mr. Covalt for the wrongful death of Mrs. Covalt. On December 17, 2007, Mr. Morgan filed a First Amended Complaint, naming Allstate Insurance Company as a co-defendant and seeking a declaratory judgment as to the amount of insurance coverage available. On December 20, 2007, Mr. Morgan filed a Second Amended Complaint against Mr. Covalt and Allstate Insurance Company, which was virtually identical to the First Amended Complaint and, again, sought a declaration of coverage under the policies at issue in the Oklahoma litigation. In all these filings, Mr. Morgan was and is represented by both New Mexico counsel Daymon Ely and Duke Halley, "the family's" long-standing Oklahoma counsel who also represented them in connection with the claim under the Allstate policy.

In Oklahoma, Mrs. Covalt's Estate first filed a motion to dismiss or to stay, asking the federal district court to abstain from deciding the case in deference to this later-filed New Mexico state court action. On April 15, 2008, the federal district court in Oklahoma entered its decision, electing to retain jurisdiction over the declaratory judgment action

filed by Allstate. Allstate Ins. Co. v. William Covalt, individually and as surviving spouse of Linda Covalt, deceased, No. CIV-07-1275-HE, Order (W.D. Okla. Apr. 15, 2008) attached hereto as Exhibit C. In so ruling, the federal district court held that the action was properly brought and should proceed in Oklahoma, emphasizing the parties' overwhelming contacts with Oklahoma, as opposed to, New Mexico:

> Both of the insurance policies in dispute were issued in Oklahoma. The automobile policy states that the liability insurance is provided. "in accordance with coverage required by the Compulsory Insurance Law of Oklahoma." Mr. Covalt, one of the policyholders, the alleged tortfeasor, and the sole beneficiary of Mrs. Covalt's estate, is a citizen of Oklahoma, Mrs. Covalt was also an Oklahoma citizen. The estate's personal representative is a citizen of Oklahoma and the estate's primary counsel is located in Oklahoma. The insured van that was involved in the accident was principally garaged in Oklahoma. The only apparent contact with New Mexico is that the car accident occurred there.

Exh. C, at 6.

In federal court, Allstate then moved for summary judgment on the liability question of the amount of insurance coverage available. The court considered but rejected the Estate's argument that I New Mexico had the most significant relationship with the subject matter and the parties, and applied Oklahoma law to the construction of the Oklahoma

policy. The Oklahoma federal district court then granted Allstate's motion for summary judgment. Exh. D hereto, June 20, 2008 Order granting summary judgment, Final judgment was entered in that case on July 8, 2008, Exh. A hereto, and Allstate then filed a certified copy of, that judgment of record in Fourth Judicial District Court, No. D-424-CV200800055, pursuant to §39-4A-3(A) NMSA 1978. Exh. B hereto. On August 6, 2008, the, Estate filed its Notice of Appeal. of the Oklahoma federal district court judgment.

Thereafter, because that judgment is entitled to full faith and credit under New Mexico law, Allstate filed a motion for summary judgment asking that the Court dismiss the present case. Exh, E hereto. Allstate's summary judgment motion was predicated entirely on the district court's lack of discretion to allow the Estate to litigate the identical coverage issues already resolved through final judgment by another court of competent jurisdiction. At oral argument on November 10, 2008, Judge Mathis stated that he refused to give full faith and credit to the Oklahoma judgment. Transcript, p. 30, attached hereto. That refusal was reflected in the Order - entered on December 1, 2008, attached hereto.

At the Plaintiff's urging, Respondent relied on the plurality opinion in Wamsley v. Nodak Mutual Ins, Co., 178 P.3d 102 (Mont. 2008) as supporting a right to ignore the Oklahoma judgment, Transcript, p. 30. In that automobile accident case occurring in Montana and involving a Montana tortfeasor who killed two North Dakota residents, three justices of the Montana Supreme Court held that the Montana

district court did not abuse its discretion in declining to defer to a North Dakota case filed less than three weeks before the Montana case. 178 P.3d at 110. Unlike this case, however, that case involved significantly more contacts with the "accident" state than just the mere fact of the accident: the tortfeasor lived in Montana, there was a judgment against the tortfeasor in Montana, the out-of-state insurer paid the Estate $200,000 in underinsured motorist coverage proceeds that had been claimed by the Estate's Montana lawyer. 178 P.3d at 112-113. Here, in contrast, the only "contact" this case has with New Mexico is the happenstance of the accident's location here.

Most critically, in Wamsley, the Montana Supreme Court rejected the "public policy" exception to full faith and credit that Plaintiff argued to the district court here. 178 P.3d at 114. It held that the fact that the North Dakota rulings "greatly offended" the public policy of Montana was "not an appropriate basis upon which to refuse full faith and credit because, as a general rule, a judgment must be afforded full faith and credit regardless of how greatly it offends the public policy of Montana." Id. at 115.

Instead, the Wamsley decision was predicated on a "unique set of circumstances," id. at 116, presenting a "very narrow exception to the general rule" of giving full faith and credit to the North Dakota judgment. Id. at 117 (Rice, J., concurring). The Wamsley court ruled that the North Dakota court's rulings were not entitled to full faith and credit because they impermissibly interfered with the

Montana litigation and attempted "to confer upon District Courts in North Dakota interlocutory control over District Courts in Montana." 178 P.3d at 116. Here, no such argument has been (or could be) made. Absolutely nothing has occurred in this case that would make recognition of the Oklahoma judgment any interference with the New Mexico district court's activities.

In Wamsley, the court determined that the declaratory judgment action in North Dakota "was brought for the purpose of preempting the District Court of Montana from exercising control over the judicial processes necessary to resolve this dispute." Id. It observed that the insurer there "took advantage of the Estate's good graces by obtaining extensions to respond to its demands, all the while buying time to file a preemptive action in North Dakota." Id. Here in contrast, when Plaintiff sought to have the Oklahoma federal court decline to hear Allstate's action for declaratory judgment on that basis, the Oklahoma federal court found no such circumstance existed:

> Consideration of whether the declaratory remedy is being used merely for the purpose of procedural fencing or to provide an arena for a race to res judicata counsels in favor of this court exercising jurisdiction over this action. To the extent either party has engaged in procedural fencing or forum shopping, the court concludes that Mr. Covalt and his counsel have done at least as much, if not more, than Allstate and its counsel. While Mr. Covalt attempts to characterize Allstate's conduct surrounding the filing of this lawsuit as less than above-board, it

> is clear that Allstate did in fact give Mr. Covalt's attorney notice of its belief that Oklahoma law applied to the insurance policy and of its intent to file a federal declaratory judgment action in Oklahoma. In that notice, Allstate proposed the possibility of the parties submitting the dispute to the court based on stipulated facts. Further, Mr. Covalt initially sought appointment as the personal representative of his wife's estate, but at some point, presumably after he realized the impact that his appointment might have on the estate's claim against him, backed off and agreed to the appointment of Mr. Morgan. Then, after Allstate had already filed its declaratory judgment action, the estate filed the tort action in New Mexico, a forum that appears less convenient to it and its principals and with little connection to the dispute apart from being the location of the accident.

4/15/08 Order denying motion to dismiss, Exhibit C hereto, at 6-7.

The Oklahoma federal court further explained:

> The cases Morgan principally relies on, Sam v. Sam, 139 N.M. 474, 134 P. 3d 761 (2006), and Wamsley v. Nodak Mutual Ins. Co., 341 Mont. 467, 178 P.3d 102 (2008), do not support the broad proposition for which he cites them (that a state court "will recognize laws and judgments of another state only if doing so does not undermine [that state's] own public policy"). Both cases are considerably more nuanced than that and do not, in the circumstances existing

> here, alter the. court's conclusion that permitting a declaratory judgment to go forward here will not improperly encroach on state jurisdiction or increase friction between states.

Id., at 1-2. Again, the Court stated: "it is worth noting that none of the parties in this case are New Mexico residents. Moreover, while both parties in this case are plainly mindful of the impact of applying either Oklahoma or New Mexico law to the pertinent inquiry, plaintiff has not engaged in the sort of forum shopping or procedural fencing that concerned the court in Wamsley." Id., n. 3. In short, this case is factually different from Wamsley.

Finally, there is yet another difference between Wamsley and the present case: In Wamsley, the insurer "never sought to have the declaratory judgment from North Dakota certified in Montana pursuant to the Uniform Enforcement of Foreign Judgments Act[.]" 178 P.3d at 116, n. 3. Here, of course, Allstate has certified the judgment entered by the Oklahoma district court, as required by and pursuant to the New Mexico Foreign Judgments Act. Thus, a critical fact on which the Wamsley Court relied is missing here.

In any event, at most, Wamsley represents a singular and anomalous decision that concocted a purported exception to the full faith and credit doctrine based on alleged "interference" with a pending Montana state court proceeding. No such "interference" is present here. Moreover, no New Mexico appellate court has ever recognized such an

exception to the constitutional principles of full faith and credit, and, indeed, such an exception does not fit into the narrow categories of exceptions to the doctrine recognized under New Mexico law. Respondent's refusal to give full faith and credit to a final judgment entered in the United States District Court of the Western District of Oklahoma is error which must be corrected now.

B. A Writ of Prohibition Should Issue As A Matter of Right When The Lower Court Proceeds Without Jurisdiction.

This Court has described a writ of prohibition as "an extraordinary writ, issued by a superior court to an inferior court to prevent the latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction in a matter over which it has no control, or from going beyond the legitimate powers in a matter of which it has jurisdiction." Johnson v. Shuler (In re Martinez), 2001-NMSC-009, Par. 7, 130 N.M. 144, 147, 20 P.3d 126, 129 (quoting State ex rel. Harvey v. Medler, 19 N.M. 252, 258, 142 P. 376, 378 (1914). While prohibition is an extraordinary writ, this Court has consistently held that prohibition will lie if a court acts outside of or, exceeds its jurisdiction. Lincoln-Lucky and Lee Mining Co. v. District Court, 7 N.M. 486, 38 P. 580 (1894); Hammond v. District Court, 30 N.M. 130, 228 P. 758 (1924); Sparks v. Caldwell, 104 N.M. 475, 723 P.2d 244 (1986).

As explained by this Court in State v. Zinn, 80 N.M. 710, 712, 460 P.2d 240, 242 (1969), "[e]ven though the issuance of a writ of prohibition is within our discretion, the writ is issued almost as a matter of

right when the trial court is totally lacking in Jurisdiction, or has exceeded its jurisdiction or is about to do so[.]" (Emphasis added), That is precisely the case here. "New Mexico courts accord full faith and credit to the judgments of sister states, unless the judgment is void." Miller v. Morrison, 2008-NMCA-92, Par. 5, 189 P.3d 676. . For that reason, New Mexico law recognizes only limited bases for challenging the validity of a judgment: "such a challenge must rest on one of the grounds that justifies the denial of full faith and credit, such as lack of jurisdiction, lack of due process, or extrinsic fraud." Conglis, 119 N.M. at 289, 889 P.2d at 1211. See also Jordan v. Hall, 115 N.M. 775, 778, 858 P.2d 863, 866 (Ct. App. 1993) ("Only the defenses o f fraud or lack of jurisdiction may be raised to destroy the full faith and credit owed a foreign judgment.").

There is no dispute that the Oklahoma district court entered its full and final judgment on July 8, 2008. The Estate had the opportunity to, and did, participate fully in the proceedings that led to the entry of that full and final judgment. Furthermore, the Estate has never contended that the judgment was somehow procured by fraud or otherwise presented any challenge to the Oklahoma district court's jurisdiction to enter the judgment, Instead, at the hearing on Allstate's summary judgment motion, counsel for the Estate argued only that the substantive result would be different under New Mexico law. Transcript. pp. 8-9. It is wellestablished, however, that "the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based." Milliken v. Meyer, 311 U.S. 457, 462 (1940).

Notwithstanding the complete absence of any evidence supporting the limited grounds for challenging the Oklahoma judgment, the district court below refused to give full faith and credit to that judgment. Transcript, p. 30. That refusal mandates issuance of a writ of prohibition by this Court.

So, for example, in State ex rel. Lynn v. Eddy, 163 S.E.2d 472, 480 (W. Va.. 1968), the West Virginia Supreme Court issued a writ of prohibition because the district court "exceeded its legitimate powers" in hearing a divorce case after final judgment was entered in another case; "a writ of prohibition will lie to prevent such abuse of power". See also Craig v. Superior Court, 119 Cal. Rptr. 692 (Cal. App. 1975) (issuing writ of prohibition to prevent lower court from requiring blood test to establish paternity where judgment in Oklahoma already established paternity); Chandler v. Cummins, 81 P.2d 651, 652 (Okl. 1938) (issuing writ of prohibition to prevent district court in one county from enjoining enforcement of -judgment entered by district court of another county); Titus v. Walliek, 306 U.S. 282, 291-292 (1939) ("The Ohio court is not free to withhold from petitioner, the record owner of a judgment valid and enforceable by him in New York, the full benefit of the constitutional command that the judgment shall receive in the courts of Ohio such faith and credit as it is entitled to receive in New York.").

Thus, in this case, Respondent acted outside of or in excess of its jurisdiction and a writ of prohibition should issue.

C. A Writ of Superintending Control Would Also Be Appropriate.

In addition to a writ of prohibition, a writ of superintending control would also be appropriate in this case. See, e.g. State ex rel. Anaya v. Scarborough, 75 N.M. 702, 713, 410 P.2d 732, 738 (1966) (writ of prohibition made permanent through court's power of superintending control); State ex rel. Demoss v. District Court, 55 N.M. 135, 139, 227 P.2d 937, 939 (1951) (writ of prohibition exercised through power of superintending control to prevent continuation of wrongful death action that was time-barred); Carrillo v. Rostro, 114 N.M. 607, 619, 845 P.2d 130, 142 (1992) (pleading for writs in the alternative appropriate when appellate remedy unclear). While the writ of prohibition appears to be the form of redress called for by this Court's precedents, the writ of superintending control could also be used to achieve the same result.

The New Mexico Constitution vests the Supreme Court with superintending control over all inferior courts. N.M. Coast. Art. VI, § 3. "The exercise of this power `is the power to control the course of ordinary litigation in inferior courts."' Rhein v. ADT Auto, 1996-NMSC-066, Par. 13, 122 N.M. 646, 650, 930 P.2d 783, 787 (quoting State v. Roy, 40 N.M. 397, 421, 60 P.2d 646, 661 (1936)). The court exercises its authority under the writ of superintending control by, inter alia, issuing extraordinary writs. Id. (quoting District Court of Second Judicial Dist. v. McKenna, 118 N.M. 402, 405, 881 P.2d 1387, 1390 (1994)). In McKenna, this Court explained the circumstances justifying use of the writ as follows:

> Using these standards, this Court has used its power of superintending control to address issues `of great public interest and importance', State

> Racing Comm'n v. McManus, 82 N.M. 108, 110, 476 P.2d 767, 769 (1970), in which `our refusal to entertain jurisdiction might amount to a denial of justice', id. at 111, 476 P.2d at 770.

118 N.M. at 405, 881 P.2d at 1390. Thus, a writ of superintending control issues when "the remedy by appeal seems wholly inadequate" or when "otherwise necessary to prevent irreparable mischief, great, extraordinary, or exceptional hardship; costly delays and unusual burdens of expense." State ex rel. Transcontinental Bus Serv. v. Carmody, 53 N.M. 367, 378, 208 P.2d. 1073, 1080 (1949); see also Chappell v. Cosgrove, 1996-NMSC-020, 121 N.M. 636, 916 P.2d 836 (granting writ to review trial court's disqualification of counsel where remedy by appeal was inadequate). This Court has also issued such writs when a party's fundamental rights or the public interest are at stake. State ex rel. State Tax Comm'n v. First Judicial District Court, 69 N.M. 295, 297-98, 366 P.2d 143, 145 (19G1). Further, this Court has previously recognized that appeal is not an adequate remedy where "it is plain that the district court has absolutely no jurisdiction." Crist v. Abbott, 22 N.M. 417, 422, 163 P. 1085, 1090 (1917); Hammond v. District Court of Eighth Judicial District, 30 N.M. 130, 138, 228 P. 758, 766 (1924); State ex rel. Demoss, supra, 55 N.M. at 139, 227 P.2d at 939.

In exercising its constitutional jurisdiction in writ proceedings, the Court has "long held that [its] power of superintending control will be exercised where the remedy by appeal is wholly or substantially inadequate or if the exercise thereof will prevent irreparable mischief, great, extraordinary or

exceptional hardship, costly delays or unusual burdens in the form of expenses." Rutledge v. Fort, 104 N.M. 7, 8, 715 P.2d 455, 456 (1986), overruled on other grounds, Reese v. State, 106 N.M. 498, 745 P.2d 1146 (1987); accord, Johnson v. Shuler, 2001 -NMSC-9, Par. 12, 130 N.M. 144, 149, 20 P.3d 126, 130; State ex. rel Transcontinental Bus Service, Inc. v. Carmody, 53 N.M. 367, 378, 208 P. 2d 1073, 1080 (1949). While Allstate will eventually gain the right to appeal Respondent's decision, its remedy by appeal to the New Mexico Court of Appeals is wholly inadequate owing to the irreparable harm to Allstate that will be caused by forcing Allstate to continue to litigate in Respondent's court substantive issues that have already been reduced to judgment following full briefing in the Western District of Oklahoma. Furthermore, since the district court below lacked jurisdiction to refuse to dismiss this case on the grounds of full faith and credit, requiring Allstate to go through a trial and subsequent appeal is particularly burdensome. Lincoln-Lucky & Lee Mining Co. v. District Court, 7 N.M. at 506, 38 P. at 587 ("Should we compel a party to appeal -- granting that such would lie -- from a void judgment, giving bond, suing out writ of error, and bringing up a cause here upon appeal, when we could only declare that the judgment below was no judgment?").

As explained extensively above, this case presents circumstances satisfying all of these bases for issuance of a writ of superintending control. For example, there is obviously a significant public interest in upholding the constitutional principle of full faith and credit. See, e.g., Thoma v. Thoma, 1997 NMCA 16, Par. 12, 123 N.M. 137, 140 ("Public policy

dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.") (quoting Baldwin v. Iowa State Traveling Men's Assn, 283 U.S. 522, 525 (1931)). See also Kopp v. Fair Political Practices Comm'n, 47 Cal. Rptr. 2d 108, 158-159 (Cal. 1995) ("There is an additional and equally strong public interest in ensuring that state courts respect and honor federal judgments, a public interest that is embodied in the doctrine of comity and in the requirement that state courts give full faith and credit to the judgments of federal courts.") (Kennard, J., concurring and dissenting); Underwriters Nat'l Ass. Co. v. North Carolina Life & Accident & Health Ins. Guar. Assn, 455 U.S. 691, 703 (1982) ("The concept of full faith and credit is central to our system of jurisprudence.").

The full faith and credit that must be accorded to the Oklahoma court's judgment is not discretionary, as this Court has recognized: "'The only escape from obedience to the rule that a judgment of a sister state is entitled to full faith and credit lies. in a holding that the judgment is void and entitled to no standing even in the state in which it was rendered."' Houston Fire & Cas. Ins. Co. v. Falls, 67 N.M. 189, 196, 354 P.2d 127, 132 (1960) (quoting May v. Anderson, 345 U.S.. 528 (1953)).

Furthermore, as discussed above, Allstate's appeal remedy is inadequate here because the district court lacked jurisdiction to require relitigation of the issues already decided in the Oklahoma final judgment. Thus, the requirements for issuance of a

writ of superintending control are fully satisfied in this case.

D. A Writ of Mandamus Would Also Be Appropriate.

"Mandamus is appropriate to compel the performance of an affirmative act by another where the duty to perform the act is clearly enjoined by law and where there is no other plain, speedy and adequate remedy in the ordinary course of law." In re Adjustments to Franchise Fees, 2000-NMSC-035, Par. 6, 129 N.M. 787, 791, 14 P.3d. 525, 529. A writ of mandamus will issue to compel a district court to recognize a foreign judgment. E.g., McGouryk v. McGouryk, 672 So. 2d 1300, 1301 (Ala. Civ. App. 1995) (Alabama Court of Civil Appeals issued writ of mandamus, compelling trial court to give full faith and credit effect to Kentucky divorce).

The fact that the Estate has appealed the Oklahoma district court judgment does not defeat Allstate's entitlement to a writ now. Thus, for example, in Brinker v. Superior Court, I Cal. Rptr.2d 358, 360 (Cal. App. 1991), the California Court of Appeals issued a peremptory writ of mandate, directing the district court to deny a petition to vacate a New Jersey court's entry of judgment confirming an arbitration award, notwithstanding the pendency of an appeal of that judgment in New Jersey.

Here, as discussed above, mandamus is appropriate because the district court. below was required to give full faith and credit to the judgment entered by the United States District Court, and was

not free simply to disregard that judgment because he apparently disagreed with it, or, for that matter, for any other reason urged by the Estate. Thus, Respondent acted outside his authority and this Court should require him to abide by constitutional principles and enter judgment in Allstate's favor as to the Estate's claim for declaratory judgment.

F. STAY OF PROCEEDINGS.

Pursuant to Rule 12-504(D) NMRA 2007, Allstate requests a stay of district court proceedings pending the ruling of this Court on this Petition. The amount of insurance coverage is really the driving issue in this case, and that issue has been resolved in Oklahoma. Nevertheless, the Estate of Linda Covalt has announced its intention of pressing forward with motion practice, discovery, designation of experts, depositions and a full-blown trial against the tortfeasor husband on liability and damages in an apparent attempt to coerce the insurer into settlement. That this "damages trial" is a sham is demonstrated by the identity of interests between the supposedly adverse Estate and the alleged tortfeasor: Mrs. Covalt's husband was the original Personal Representative of her Estate, he is the guardian of their disabled adult daughter, and, most important he is a statutory beneficiary of any recovery to be had against him under the New Mexico Wrongful Death Statute. There is absolutely no reason to allow that sham trial to go forward until the coverage issue is finally put to rest.

VI. STATEMENT OF RELIEF SOUGHT.

Allstate respectfully requests that the Court

issue a writ of prohibition', superintending control, or mandamus, directing that Respondent shall enter an order dismissing the case against Allstate. Three alternative forms of Writ are attached to this petition in Appendix A.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

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July 15, 2009
IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
N0. 31,449

ALLSTATE INSURANCE COMPANY, Petitioner,
v.
HON. EUGENIO S. MATHIS, District Court Judge, Respondent,
and
LOREN MORGAN, as personal representative of the Estate of LINDA E. COVALT, and WILLIAM D. COVALT, Real Parties in Interest.

ORDER

WHEREAS, this matter came on for consideration by the Court upon petition for writ of superintending control, response thereto, supplemental briefs, and oral argument by the parties, and the Court having considered said pleadings and oral argument and being sufficiently advised, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, Justice Charles W. Daniels, and Judge James J. Wechsler concurring, Chief Justice Edward L. Chavez recusing;

NOW, THEREFORE, IT IS ORDERED that the petition far writ of superintending control hereby is GRANTED and a writ of superintending control shall issue.

IT IS SO ORDERED.

July 15, 2009
IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
N0. 31,449

ALLSTATE INSURANCE COMPANY, Petitioner,
v.
HON. EUGENIO S. MATHIS, District Court Judge,
Respondent,
and
LOREN MORGAN, as personal representative of the Estate of LINDA E. COVALT, and WILLIAM D. COVALT, Real Parties in Interest.

GREETINGS:

WHEREAS, a petition for a writ of superintending control having been filed in this matter and having been granted by this Court on July 15, 2009, and the Court being sufficiently informed, and good cause appearing for the issuance of a writ of superintending control;

NOW, THEREFORE, you, the respondent, Hon. Eugenio S. Mathis, shall give full faith and credit to the judgment issued by the Oklahoma federal district court and enter an order dismissing plaintiffs claim for declaratory judgment in, cause numbered CV-2007-00108, *Morgan* v. *Covalt and Allstate Insurance Company*.

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(2)

No. 09-128

Supreme Court, U.S.
FILED
AUG 28 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

WILLIAM COVALT, Individually, and
LOREN MORGAN, as Personal Representative
of the Estate of LINDA COVALT, Deceased,

Petitioners,

v.

ALLSTATE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly exercised its discretion by accepting jurisdiction over this first-filed contractual insurance dispute under the Federal Declaratory Judgment Act.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

In accordance with SUP. CT. R. 29.6, Respondent, Allstate Insurance Company ("Allstate") states that it is a wholly-owned subsidiary of The Allstate Corporation, a publicly-held Delaware corporation.

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SUMMARY OF RESPONDENT'S ARGUMENT

The Petition presents nothing more than a fact-bound challenge to a district court's discretionary decision to exercise jurisdiction over this first-filed insurance dispute under the Federal Declaratory Judgment Act ("Act"). The underlying dispute involved Oklahoma insurance contracts issued to Oklahoma citizens covering risks principally located in Oklahoma. After giving Petitioner Covalt notice and the opportunity to join in the case on stipulated facts, respondent Allstate filed this action in federal district court in Oklahoma, seeking a declaration of its contractual obligations.

Petitioners thereafter filed a state-court tort lawsuit in New Mexico, and sought to dismiss this lawsuit on the ground that the contractual issue presented here should be decided there. Applying a number of well-settled discretionary factors, the district court below declined to dismiss this action in light of the New Mexico lawsuit, and the United States Court of Appeals for the Tenth Circuit affirmed on the ground that the district court did not thereby abuse its discretion. This case accordingly involves nothing more than the discretionary application of settled law to fact, and does not remotely implicate a circuit conflict. The United States Court of Appeals for the Fifth Circuit case cited by Petitioners also affirmed a district court's exercise of its discretion concerning jurisdiction under the Act, and the district court there simply declined to exercise that jurisdiction on the particular facts of that case. It is

not surprising that courts reach different results in applying discretionary factors to different facts; indeed, that is the very essence of discretion. This Court should deny the Petition.

STATEMENT OF THE CASE

Petitioner William Covalt, his wife Linda, and their daughter LaDon all lived in Oklahoma and were Oklahoma citizens. They owned a 1999 Ford Econoline van principally garaged at their Oklahoma home. In August 2007, the Covalts were returning home from a trip to California. While driving through New Mexico on U.S. Interstate Highway 40 at approximately 1:00 a.m., Mr. Covalt lost control of the van. It rolled over, killing Mrs. Covalt. No other vehicle was involved, no other persons were injured, and no other property was damaged.

Before the accident, the Covalts purchased two insurance policies from Respondent Allstate in Oklahoma: (1) an automotive policy which provided both uninsured motorist ("UM") and liability coverage (the "Auto Policy") and (2) a Personal Umbrella Policy (the "PUP"). Allstate issued the Auto Policy pursuant to the requirements of Oklahoma's Compulsory Insurance laws. (10th Cir. App., Tab 6, p. 144) ("Liability Insurance is provided in this Policy in accordance with coverage required by the Compulsory Insurance Laws of Oklahoma"). The Auto Policy contained an exclusion which reduced (*i.e.*, "stepped-down") the liability coverage limits from $250,000 to Oklahoma's

statutory minimum ($25,000) whenever the injured person was a relative of, and resided with, the insured. The PUP was a general excess liability policy which applied only to bodily injury damages exceeding $100,000 and which excluded all coverage for personal injuries sustained by an insured.

Both the Auto Policy and the PUP were purchased in Oklahoma, issued in Oklahoma, and covered risks principally located in Oklahoma. Consequently, both policies contained virtually the same choice of law provision which defaulted to Oklahoma law unless one stated exception applied. (10th Cir. App., Tab 6, p. 159 (Auto Policy), and p. 182 (PUP).)

After the accident, Mr. Covalt hired an Oklahoma attorney and filed a probate action concerning his wife's Last Will and Testament in Oklahoma state court. Mrs. Covalt's Will named Mr. Covalt (the tortfeasor) as the sole beneficiary and personal representative of her estate. (10th Cir. App., Tab 6, p. 201.) Mr. Covalt, as Mrs. Covalt's surviving spouse, then asserted a claim with Allstate (through the same attorney) under the Auto Policy for Mrs. Covalt's death.

Allstate determined that the UM limits of $250,000 were owed, and that the Auto Policy's "step-down" provision limited liability coverage to Oklahoma's minimum limits ($25,000) because the injured person (Mrs. Covalt) was a resident relative of the insured (Mr. Covalt). In early November 2007, Allstate's Oklahoma counsel contacted Mr. Covalt's counsel and informed him that Allstate would pay the

Auto Policy's UM limits of $250,000 and offered the stepped-down liability coverage limits of $25,000. Allstate's counsel also expressed Allstate's conclusion that the step-down provision was enforceable under Oklahoma law, which governed the construction of the policy. Mr. Covalt's attorney stated his belief that New Mexico law governed this insurance policy and that the step-down provision was not enforceable under that law. (10th Cir. App., Tab 4, p. 43.)

Allstate's counsel informed Mr. Covalt's counsel that Allstate intended to file a declaratory judgment action in Oklahoma federal court on the issue of coverage, and *invited* Mr. Covalt to join in that action on stipulated facts. Mr. Covalt's counsel never responded. *Id.* Four days later, on November 13, 2007, Allstate's counsel sent a courtesy copy of the Complaint seeking declaratory judgment to Mr. Covalt's counsel prior to filing, and again invited him to join in the action. Again, there was no response. Later that same day, Allstate filed this declaratory judgment action in the United States District Court for the Western District of Oklahoma. Mr. Covalt subsequently nominated another Oklahoma citizen, Petitioner Loren Morgan, and had him appointed personal representative of his wife's estate by the Oklahoma probate court, without notifying Allstate. (10th Cir. App., Tab 6, p. 203.)

Mr. Covalt's counsel then associated with a New Mexico lawyer and filed suit in that state on December 6, 2007, on behalf of Mr. Morgan *against* Mr. Covalt. The New Mexico suit originally included

only allegations of *tort liability* (wrongful death). There is no dispute over the choice of New Mexico as a proper venue for litigating any *tort* claims arising from the accident. However, in an effort to make the second-filed New Mexico state action mirror Allstate's federal declaratory contract action, Mr. Morgan filed an amended complaint on December 17, 2007, and a second amended complaint on December 20, 2007, adding Allstate as a defendant and asserting a claim for declaratory judgment that the Oklahoma policy exclusions were unenforceable under New Mexico law. (10th Cir. App., Tab 4, pp. 33-38.) Mr. Covalt then moved to dismiss or stay this Oklahoma federal declaratory action.

The district court denied that motion after concluding, based on all applicable factors, that this action was an appropriate use of the Act. Specifically, the district court applied the discretionary factors set forth by the Tenth Circuit in *State Farm Fire & Casualty Company v. Mhoon*, 31 F.3d 979, 983 (1984), for determining when a district court should exercise jurisdiction over a declaratory action.

After the district court denied Covalt's Motion to Dismiss or Stay, Allstate moved for summary judgment on the issue of coverage. The district court then addressed the conflict of law issue, holding that Oklahoma law governed the contract dispute, and ruled in favor of Allstate on the merits. On appeal, a unanimous panel of the Tenth Circuit, in an unpublished

opinion, affirmed the district court's analysis and conclusions in all respects.

REASONS FOR DENYING THE PETITION

I. The Tenth Circuit Properly Affirmed The District Court's Discretionary Decision To Hear Allstate's First-To-Be-Filed Declaratory Coverage Action.

A. The District Court's Exercise of Jurisdiction Under the Act is Reviewed for Abuse of Discretion.

"Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts *unique and substantial discretion* in deciding whether to declare the rights of litigants." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995) (emphasis added). This Court has "distinguish[ed] the declaratory judgment context from other areas of the law in which concepts of discretion surface" and has given lower courts a larger "breadth of leeway" for their exercise of discretion under the Act. *Id.*, at 287. So long as the lower court's decision to accept jurisdiction is not arbitrary, capricious or manifestly unreasonable, and does not exceed the bounds of permissible choice under the circumstances, the lower court will be found to have properly exercised its substantial discretion. *Rogers v. Andrus Transp. Servs.*, 502 F.3d 1147, 1153 (10th Cir. 2007); *Patterson by Patterson v. Coca-Cola Bottling Co. Cairo-Sikeston*, 852 F.2d 280,

283 (7th Cir. 1988); *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 971 (8th Cir. 1984).

B. The Oklahoma Federal District Court was a Proper Forum for Resolution of an Insurance Contract Coverage Dispute Between Citizens of Different States Involving Allegedly Competing Public Policies of Two States.

The Oklahoma federal district court was a perfectly appropriate forum for resolution of this contractual insurance coverage dispute involving Allstate, Oklahoma citizens and Oklahoma policies, particularly given the presence of an underlying alleged conflict of laws between two states. The Act states in pertinent part as follows: "In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201; *accord*, FED.R.CIV.P. 57. Congress passed the Act for the very purpose of the early resolution of disputes: "The remedy made available by the Declaratory Judgment Act and Rule 57 is intended to . . . afford one threatened with liability an early adjudication without waiting until an adversary should see fit to begin an action[.]" WRIGHT, MILLER, AND KANE, Federal Practice & Procedure, Civil § 2751 (3d ed. 1998).

Circuit courts have recognized the usefulness of the Act in resolving insurance coverage disputes. As the Tenth Circuit has stated, "Declaratory judgment actions are seen as useful in actions wherein insurance companies seek to have their liability declared. *We have expressly recognized that one of the primary functions of the Act is to provide the insurer such a forum.*" *Farmers Alliance Mut. Ins. Co. v. Jones*, 570 F.2d 1384, 1386 (10th Cir. 1978) (emphasis added). Indeed, federal declaratory judgment actions are the process by which insurance coverage disputes are traditionally resolved. *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 494 (4th Cir. 1998); *see also, E.R. Squibb & Sons, Inc. v. Lloyd's & Cos.*, 241 F.3d 154, 177 (2d Cir. 2001) ("[L]itigation over insurance coverage has become the *paradigm* for asserting jurisdiction [under the Act.]") (emphasis added).

C. The District Court Accepted Jurisdiction Based on a Thorough Review of Appropriate, Well-Established Factors.

The district court acted within its substantial discretion by applying the well-established factors set forth by the Tenth Circuit in *State Farm Fire & Casualty Company v. Mhoon*, 31 F.3d 979 (10th Cir. 1994) to the unique facts of this case. In *Mhoon*, the Tenth Circuit held that a district court should consider the following factors when determining whether to hear a declaratory action:

(1) Whether the declaratory action would settle the controversy;

(2) Whether it would help clarify the parties' legal relations at issue;
(3) Whether it is being used for "procedural fencing";
(4) Whether it would increase friction between federal and state courts and encroach upon state jurisdiction; and,
(5) Whether there is a better or more effective alternative forum.

In both the district court and on appeal, Petitioners conceded that *Mhoon* governed their Motion to Dismiss or Stay. (10th Cir. App., Tab 4, p. 22.) Petitioners have never argued that *Mhoon* contravened the law from this Court or any appellate court. Petitioners failed to show that the district court's discretionary application of even one of the *Mhoon* factors was arbitrary or manifestly unreasonable. That is why the Tenth Circuit had no difficulty affirming the district court's application of those discretionary factors to the facts of this case.

The record amply reveals that the district court's decision to hear the declaratory action was reasonable and well-grounded in both the facts and law. The lower court reviewed the extensive and predominating contacts of this contract dispute showing that all material contacts were in Oklahoma and concluding that it would be appropriate for the parties to litigate

coverage in an Oklahoma forum. (Petitioners' App., p. 34a.)[1]

Moreover, the district court observed that the wrongful death claim filed in New Mexico was distinct and severable from the coverage issue under the Oklahoma policies. (Petitioners' App., p. 32a-33a.) Coverage is a matter of contract construction and enforceability which is distinct from the tort issues of liability and damages. *Resort Car Rental Sys., Inc. v. Chuck Ruwart Chevrolet, Inc.*, 519 F.2d 317, 319 (10th Cir. 1975) ("[T]he construction of a contract is a question of law for the court."). The plain language of the Act clearly establishes that a declaratory coverage action need not resolve underlying tort claims. 28 U.S.C. § 2201 ("[A]ny court of the United States . . . may declare the rights and other legal relations of

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[1] The lower court found the following Oklahoma contacts: (1) Allstate issued both insurance policies in Oklahoma; (2) The Oklahoma Auto Policy expressly notes that the insurance is provided in accordance with the requirements of Oklahoma's Compulsory Financial Responsibility laws; (3) Mr. Covalt, as a policyholder, the alleged tortfeasor, and sole beneficiary of his deceased wife's estate, is a citizen of Oklahoma; (4) Mrs. Covalt was, prior to her death, a citizen of Oklahoma; (5) The Personal Representative of the deceased's Estate is a citizen of Oklahoma; (6) The Estate's primary legal counsel is located in Oklahoma; and, (7) The insured auto involved in the accident was principally garaged in Oklahoma. The only connection of this case to New Mexico was that the underlying accident happened to occur there. (Petitioners' App., p. 34a.)

any interested party . . . whether or not further relief is or could be sought.").[2]

Furthermore, the district court considered (and properly rejected) Petitioners' contention that Allstate had engaged in improper "procedural fencing." There was no evidence that Petitioners were lulled into inaction, that Allstate preemptively filed because Petitioners were threatening litigation or that Allstate acted for any other improper or abusive reason.[3] Rather, as the district court noted, Allstate's actions were "above board," as it attempted to resolve this matter in an open, prompt manner. Allstate twice invited Petitioners to join the declaratory coverage

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[2] *See also, Kunkel v. Cont'l Cas. Co.*, 866 F.2d 1269, 1276 (10th Cir. 1989) ("Nothing in the Declaratory Judgment Act prohibits a court from deciding a purely legal question of contract interpretation which arises in the context of a justifiable controversy presenting other factual issues."); *Kapiloff*, 155 F.3d at 494 (upholding a declaratory judgment even though it did not resolve underlying state law tort claims); *Harris v. U.S. Fid. & Guar. Co.*, 569 F.2d 850, 852 (5th Cir. 1978) ("It is well settled that a district court may render a declaratory judgment though that judgment will not settle all the issues of the entire controversy. The controversy settled by the declaratory judgment need only be an autonomous dispute."); 6A MOORE'S FEDERAL PRACTICE § 57.08(4) (2d ed. 1974).

[3] For examples where such conduct did occur, *see, Aetna Cas. & Sur. Co. v. Ind-Com Elec. Co.*, 139 F.3d 419, 423 (4th Cir. 1998); *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599 (5th Cir. 1983); *Cont'l Cas. Co. v. Robsac Indus.*, 947 F.2d 1367, 1373 (9th Cir. 1991); (*overruled on other grounds*) and, *St. Paul Fire & Marine Ins. Co. v. Runyon*, 53 F.3d 1167, 1170 (10th Cir. 1995).

action with stipulated facts, informed them in advance of the intent to file the declaratory action in federal court, selected a convenient court in Petitioners' home-state and, after receiving no response, proceeded to file in a timely manner.[4] (Petitioners' App., p. 35a.)

Finally, the district court properly weighed whether its resolution of the coverage dispute involving Oklahoma citizens, Oklahoma insurance policies and risks principally located in Oklahoma might "gratuitously interfere" with a New Mexico state court's jurisdiction. The district court observed that, while the administrative regulation of the

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[4] As the District Court observed, if any party had engaged in procedural gamesmanship, it was Petitioners: "To the extent either party has engaged in procedural fencing or forum shopping, **the court concludes that Mr. Covalt and his counsel have done at least as much, *if not more*,** than Allstate and its counsel." (Petitioners' App., p. 35a) (emphasis added). Covalt's counsel told Allstate no personal representative had been appointed and never responded to Allstate's open invitations. After Allstate filed, Covalt and his attorney waived his appointment as Personal Representative, had Morgan appointed in his place, never gave Allstate notice of the new appointment, left Oklahoma and traveled 340 miles to New Mexico to "sue" Covalt (but not Allstate) in New Mexico state court for wrongful death. Then, after adding Allstate to the New Mexico case under a declaratory judgment claim of their own, Petitioners filed two Motions to Dismiss Allstate's first-filed federal action and argued that it was "gratuitously interfering" with their second-to-be-filed New Mexico action, and that Allstate's claim should be dismissed for failing to join Morgan, the theretofore undisclosed Personal Representative. (*See*, 10th Cir. App., Tabs 4, 14.)

insurance industry is traditionally left to the states, the resolution of coverage disputes under insurance policies is an accepted role for federal courts and an appropriate use of the Act. (Petitioners' App., pp. 33a-34a.) *See also, Kapiloff,* 155 F.3d at 494; *Cincinnati Ins. Co. v. Holbrook*, 867 F.2d 1330, 1333 (11th Cir. 1989).

Petitioners submitted no evidence to support their claim of gratuitous interference. In essence, they argued to the lower court (as they do now to this Court) that *anytime* an insurance company files a declaratory action in federal court, if the insured or tort claimant later files his or her own declaratory action in a state court, the federal court must stand down. The district court properly rejected that extreme position. *See, e.g., State Auto. Ins. Cos. v. Summy*, 234 F.3d 131, 136 (3d Cir. 2000) (holding gratuitous interference occurs when a federal court declares the rights of litigants on unsettled issues of state law currently pending before that state's appeals court); *Franklin Life Ins. Co. v. Johnson*, 157 F.2d 653, 659 (10th Cir. 1946) (The mere "maintenance of [a] declaratory judgment action does not amount to a usurpation of state court jurisdiction. There is no interference with the orderly and comprehensive disposition of pending state court litigation.").

II. The District Court's Proper Exercise Of Its Discretion Under The Act Did Not "Change The Law" Governing Any Issue In This Case, Nor Did It Violate "Erie Policy" Or Deprive Morgan Of Any Traditional Privilege Of Selecting The Forum For His Tort Claim Against Covalt.

Petitioners insist, however, that the district court's decision to accept jurisdiction "changed the law" applicable to this Oklahoma-based contract dispute, deprived Morgan of his choice of forum for his tort claim, and somehow violated the principles of *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938). Petitioners base that argument on *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

That reliance is unavailing. The only issue in *Van Dusen* was whether a change in venue under the federal transfer statute, 28 U.S.C. § 1404(a), should result in a change in the substantive law applicable to the plaintiffs' tort claims. 376 U.S., at 625.[5] This Court ruled that a change of venue could not be used to shut the courthouse doors to the plaintiffs'

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[5] In *Van Dusen*, personal representatives of the victims of a commercial airliner crash in Massachusetts filed numerous wrongful death actions in both Massachusetts and Pennsylvania federal court. The defendants moved under 28 U.S.C. § 1404(a) to transfer the Pennsylvania actions to Massachusetts. The district court held that transfer of venue to another state was proper even though numerous Pennsylvania plaintiffs had not qualified under Massachusetts law to sue as personal representatives.

wrongful death claims by changing the applicable law.

Van Dusen is inapposite because a transfer of venue did not occur here nor was it ever requested. Thus, no "change of law" was made. In fact, when the district court accepted jurisdiction over Allstate's contractual declaratory judgment claim, the question of which state's law would apply to the contracts was still undetermined. The conflict of laws issue was not presented for decision by Petitioners' Motions to Dismiss or Stay Proceedings, but only by Allstate's subsequent Motion for Summary Judgment. Also, Petitioners' characterization that a change of law occurred assumes (incorrectly) that New Mexico law governed the insurance contracts *in the first instance*. Whether New Mexico law governed the policies was a legal proposition which they failed to demonstrate to the district court, failed to demonstrate to the Tenth Circuit, and have not even attempted to demonstrate to this Court.

Furthermore, the district court decision to accept jurisdiction over the declaratory judgment claim did not foreclose, or in any way affect, Petitioner Morgan's ability to prosecute his tort claim in the forum of his choosing (New Mexico). The parties never disputed that New Mexico law governed Morgan's *tort* claim or that New Mexico state courts would have jurisdiction over that claim. Consequently, it is clear that the district court's proper exercise of jurisdiction over the contractual coverage dispute did not deprive Morgan of any traditional prerogative to select the forum for his tort claim.

Further, Petitioners' effort to invoke "*Erie* Policy" (that "the 'accident of diversity' [should] not result in a substantially different outcome in federal court than would be achieved if the action were filed in state court") (Petition, p. 6) must also fail because the "*Erie* Policy" they invoke clearly was not violated here. That doctrine aims to prevent inconsistent results between cases filed in a federal court under diversity jurisdiction and cases filed in state court *in the same state where the federal court sits*. This case presents no danger of any such inconsistency. Had Allstate filed this declaratory judgment action in Oklahoma state court, Oklahoma's choice of law rules still would have governed. *See, Bohannon v. Allstate Ins. Co.*, 820 P.2d 787 (Okla. 1991); 12 Okla. Stat. § 1651 (providing declaratory judgment actions in Oklahoma state courts). Thus, while the diversity of citizenship between the litigants here allowed Allstate to bring the matter in the neutral federal court, it in no way resulted in a different outcome than would have occurred if the case had been brought in Oklahoma state court.

III. There Is No Split Between The Tenth And Fifth Circuits On Any Issue Presented Here.

Petitioners claim that the Fifth Circuit in *Mission Insurance Company v. Puritan Fashions Corporation*, 706 F.2d 599 (5th Cir. 1983) held that a district court should not hear a federal declaratory action if doing so would change the law to be applied

in the declaratory defendant's state court action. (Petition, p. 10.) Again, no "change in the law" occurred here. But even if it did, the Fifth Circuit in *Mission* never endorsed any such rule.

Rather, the Fifth Circuit in *Mission* (like the Tenth Circuit in this case) utilized several factors to review a district court's exercise of discretion under the Act regarding whether to accept jurisdiction. *Id.*, at 601 ("The district court may . . . take into account a wide variety of factors. Our review of the district court's action is limited to whether it abused its discretion.") (In fact, the Tenth Circuit in *Mhoon* even cites *Mission* as support for the abuse of discretion standard it employs. *Mhoon*, 31 F.3d at 983, fn. 6). Moreover, a comparison of *Mission* to the Tenth Circuit's decision in the present case reveals that both circuits considered and applied effectively the same law. *Compare, Mission*, 706 F.2d at 602-03, *with Covalt*, Petitioners' App., pp. 32a-35a.

A comparison of *Mission* to the present case also makes clear that the lower courts reached different discretionary decisions not because they applied different law, but because they faced markedly different facts. *Mission* involved an insurance claim by a clothing manufacturer for the alleged theft of $900,000 in merchandise. The clothing was manufactured in Texas, but the FBI investigation led to the conviction of two individuals in California. The insurance policy contained a one-year limitations period for filing suit. The insured requested an extension of that deadline. The insurer promised to

allow the insured additional time to file suit up to thirty days after such time as the claim might be denied in writing. Subsequently, the insurance company's "president orally rejected [the] claim, and this declaratory judgment suit was filed by the [Insurance] Company in Texas *that same day.*" *Mission*, 706 F.2d at 600.

The insured then filed its own suit in California asserting not only a declaratory judgment claim, but claims of bad faith, fraud and unfair claim settlement practices against the insurance company, as well as tort claims for conversion against other defendants. The Fifth Circuit affirmed the Texas federal district court's decision not to accept jurisdiction, finding:

> Plaintiff caused Defendant to delay filing suit in California by representing that Plaintiff was considering the merits of the claim and by allowing an extension of the one year limitations period. But for those representations and implications, Defendant would have been the first to file an action presenting the same issues (plus a few more), and the forum for the trial of those [factual] issues presented in this suit would be in California.

Id., at 601.

Clearly, the facts of *Mission* are nothing like those here. As noted above, Allstate promptly informed the insured of its coverage determination. When the insured disagreed, Allstate informed him in advance of its intention to file a declaratory action in

Oklahoma federal court and invited him to participate. The insured never expressed any intention to file suit. Further, there were no factual issues to be determined in the coverage dispute, which was purely a legal issue, and all contacts relevant to the contractual dispute were in Oklahoma, not New Mexico. Thus, the Tenth Circuit's affirmance of the lower court's decision to accept jurisdiction was entirely consistent with the Fifth Circuit's holding in *Mission*.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 09-128

IN THE

Supreme Court of the United States

WILLIAM COVALT, INDIVIDUALLY, LOREN MORGAN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LINDA COVALT, DECEASED, PETITIONERS

v.

ALLSTATE INSURANCE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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SUMMARY OF REPLY

Allstate presents this case as a simple insurance coverage dispute. In fact, it is a choice of law dispute. Allstate knew that the New Mexico choice of law rule was to apply the law where the accident happened. Consequently, if New Mexico was the forum deciding the issue, the drop down provision would not be enforced. To avoid that result Allstate filed this case in federal court in Oklahoma.

The lower court's in the Fifth Circuit have interpreted *Mission Insurance Co. v. Puritan Fashions Corp.* as Petitioner's have, i.e. that choosing one forum over another where the difference in forum changes the law that applies to the case is an improper reason for bringing a declaratory judgment action. 706 F.2d 599 (5th Cir.1993), footnote 3. That conclusion is consistent with this Court's warning that the act not be used to interfere with state issues being simultaneously addressed by a state court. *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 62 S.Ct. 1173 (1942), and *Wilton v. Seven Falls Co.*, 515 U.S. 177, 115 S.Ct. 2137 (1995). It also is consistent with Erie concerns this Court addressed under similar circumstances in *Van Dusen v. Barrack*. 376 U.S. 612 (1964).

Allstate's claim that Erie is not implicated except in instances where the federal and state court are sitting in the same state is not correct. *Van Dusen* held that Erie principles applied when the laws of different states were at issue and that a non resident should not be allowed to achieve a result in federal court that could not be achieved in the state where the plaintiff filed the lawsuit. Allstate denies that was the

result here. But, in fact, that is exactly what occurred. By filing the declaratory judgment action Allstate achieved what it could not have achieved in New Mexico, where the real plaintiff filed suit.

In *Van Dusen* this court saw the importance of preventing manipulation of choice of law questions by use of a federal statute that was procedural and discretionary. The Federal Declaratory Judgment Act is both procedural and discretionary. The issue presented here is just as important in the context of the declaratory judgment statute as it was regarding the change of venue statute involved in *Van Dusen.* Involved are issues of federalism and the importance of the interrelationship between state and federal courts.

FACTUAL CLARIFICATION

Allstate is correct that its lawsuit was filed only four days after the issue of whether Oklahoma or New Mexico law applied came to a head. It fails to acknowledge that two of those days were on a weekend and one was a federal holiday. The present lawsuit was filed the first day the courthouse was open. App. 36a, ft note 2.

ARGUMENT AND AUTHORITIES

I. THE FEDERAL DECLARATORY JUDGMENT ACT IS NOT A MECHANISM TO RESOLVE COMPETING PUBLIC POLICIES OF DIFFERENT STATES.

Stripped to its core Allstate's justification for exercise of jurisdiction is stated at page 7 of its brief. It asserts that a federal court was the proper forum to

resolve "competing public policies of two states". That contention, on its face, is in conflict with this Court's warning in *Brillhart and Seven Falls Co.* that exercising declaratory jurisdiction, when there is a concurrent state court action, should be considered vexatious, uneconomical and "gratuitous interference". The argument smacks of federalism at its extreme.

A District Court's discretion whether or not to exercise declaratory jurisdiction is not unlimited. That discretion, as well as the legislative grant of jurisdiction, is subject to Constitutional restrictions. In the present case the Erie doctrine is the constitutional restriction primarily involved.

II. THE FEDERAL COURTS RULING DID CHANGE THE LAW TO BE APPLIED TO THE REAL PLAINTIFF'S LAWSUIT. THE NEW MEXICO COURT FELT COMPELLED TO GIVE FULL FAITH AND CREDIT TO THE FEDERAL COURT'S RULING. AS A RESULT, NEW MEXICO WAS FORCED TO APPLY OKLAHOMA LAW EVEN THOUGH DOING SO VIOLATED NEW MEXICO'S PUBLIC POLICY.

Allstate first says that it was appropriate for the federal court to resolve the competing public policies that were presented. Yet, it then argues that the exercise of jurisdiction by the Oklahoma federal court did not change the law governing any issue involved. Those arguments are inherently inconsistent. The federal court was indeed deciding a dispute involving competing public policies. Once it decided to apply Oklahoma law Allstate sought, and obtained, a

judgment that the Order was due full faith and credit. The New Mexico Supreme Court felt compelled to apply Oklahoma law, even though doing so violates New Mexico's public policy. Stating that the Order entered in this case did not change the law that would have been otherwise applied to a plaintiff's lawsuit is therefore incorrect.

The Allstate policy provided coverage for incidents occurring in New Mexico. It permitted a lawsuit to be filed there and New Mexico law to apply in those proceedings. Absent interference by the Oklahoma federal court this would have been an uncomplicated wrongful death case rightfully tried in New Mexico under New Mexico law. Allstate does not seriously disagree that, had Petitioner's choice of forum not been interrupted by the Oklahoma federal court proceeding, any wrongful death judgment entered in New Mexico would have been enforced against Allstate up to the full liability limits of $2,250,000.00. Now, any judgment will be enforced at a maximum of $25,000.00.

Allstate's contention that the above result does not raise serious Erie issues is not correct.

III. THE LOWER COURTS HAVE CONSTRUED MISSION TO SAY CHOOSING ONE FORUM OVER ANOTHER, WHERE THE DIFFERENCE IN FORUM CHANGES THE LAW THAT APPLIES TO THE CASE, IS AN IMPROPER REASON FOR BRINGING A DECLARATORY JUDGMENT ACTION.

Petitioner's interpretation of *Mission Ins. Co. v. Puritan Fashions Corp.* 706 F.2d 599 (5th Cir. 1983) is

that it held using the federal declaratory judgment act is improper if doing so changes the law that applies to the case. The Fifth Circuit stated as much in the later case of *Sherwin-Williams Co. V. Holmes County*, 343 F.3d, 383, 397 (C.A. 5, 2003) FN6, 399. Numerous lower courts have stated the same.[1]

Petitioner believes that legal concept is a correct one, if Allstate's true motive for bringing the declaratory action is considered. Allstate claims, at page 16 of its brief, that it was "allowed" to invoke diversity jurisdiction in a "neutral" federal court. However, it was not neutrality that Allstate sought. It was seeking a favorable choice of law forum, in order to avoid New Mexico choice of law rules. Allstate does not claim otherwise. Nor has it provided any case that permitted the Act to be used in such a way.

Neither the Trial Court or the Tenth Circuit considered whether Allstate was using the act to avoid unfavorable law or to change the law that would otherwise have been employed in the state court action that was filed. As discussed below, that is a

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[1] The district courts in the Fifth Circuit have cited *Mission* to the effect that "choosing one forum over another where the difference in forum changes the law that applies to the case" is "an improper reason for bringing a declaratory judgment". Or, stated conversely that "choosing one forum over another where the difference in forum does not affect the law that applies to the case" is a factor to consider in deciding whether to exercise jurisdiction. *Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383, 397, (C.A. 5, 2003)FN6, 399. *Pennsylvania General Insurance Company v. Caremarkpcs* 2005 WL 2041969 , FN 3(N.D. Tx., Dallas Division); *Capco International, Inc. v. Haas Outdoors, Inc.* 2004 WL 792671, FN 4 (N.D. Tx., Dallas Division); *Dresser, Inc. v. Lowry* 320 F.Supp 2d 486, 495, (W.D. La, 1970).

consideration required because of Erie concerns. Further, lack of such an analysis ignores this Court's Brillhart and Seven Falls warnings against interfering with concurrent state court proceedings.

IV. ERIE REQUIRES THAT FEDERAL DIVERSITY JURISDICTION NOT ENABLE A LITIGANT TO ACHIEVE A RESULT IN FEDERAL COURT DIFFERENT THAN WOULD OCCUR IN STATE COURT.

Allstate claims that the Erie policies only seek to prevent inconsistent results in cases between federal and state courts sitting in the same state. Pg. 16 of Allstate's brief. That is not correct. In *Van Dusen* a state court was not even involved. And, the issue was which of two state laws had to be applied. The issue was whether a federal procedural statute could be used to permit a litigant to "get a change of law as a bonus". *Van Dusen* at 636. The court concluded such a result would violate Erie.

Allstate says *Van Dusen* is not applicable because a transfer of venue did not occur, nor was it requested, in the present case. While it is true that a different procedural statute was involved, that does not mean the Van Dusen concerns are not relevant here.

The *Van Dusen* court was concerned that nonresidents, "properly subjected to suit in the transferor State not invoke section 1404 (a) to **gain the benefits of the law of another jurisdiction.**" id at 638, emphasis added. The same concern should exist here. There, as here, the concern was application of choice of law doctrines of different states. The only

difference is that the declaratory judgment statute was invoked here (as opposed to the change of venue statute) to "gain the benefit" of Oklahoma law and to destroy the wrongful death plaintiff's right to have New Mexico law apply.

Certiorari was granted in Van Dusen "to review important questions concerning the construction and operation of" the federal change of venue statute. *Van Dusen*, at 615. Here, it was the declaratory judgment act that was used as a choice of law tool. Whether that use is proper is an important question that should be addressed by this Court.

Respectfully submitted,

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